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THE CONSTITUTIONAL HISTORY
AND GOVERNMENT
OF THE
UNITED STATES
BY
JUDSON S. LANDON, LL. D.

SECOND REVISED EDITION



BOSTON AND NEW YORK
HOUGHTON MIFFLIN COMPANY
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1905

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NOTE TO SECOND REVISION

IN this revision but few changes or additions have been found to be necessary. Although the field of the national activities has been greatly enlarged by our acquisition of foreign territory, no domestic or international situation has arisen, or seems likely to arise, for which the constitution as it is practically expounded upon the principles previously established and as presented in the former editions does not afford adequate and proper provision. To multiply the illustrations would expand the work, possibly without adding much to its practical value.

J. S. L.

September 1, 1905.

PREFACE TO THE FIRST REVISED EDITION.

In this edition some of the chapters have been rewritten and the others have been carefully revised. The conditions and circumstances which favored the institution of self-government in the colonies have received more attention. Care has been taken, however, to limit the narrative portions of the work to the collocation of such facts as serve to show the course of our constitutional system in its beginnings, growth, and development. Many notes have been added, a considerable number of them illustrative of the objections and spirit of opposition which the practical development of the system has encountered. The labors of the Supreme Court in giving a sensible and practicable construction to the Constitution are constant, and some account of the most important since the earlier edition has been added. Recent important events at home and abroad involving or promising to involve the scope of constitutional powers have received attention.

It seems clear to the author, and he has tried to make it so to the reader, that our constitutional system has been brought about and developed in a very natural and sensible way. He has not attempted to exhaust the subject, but to make it easier for the general reader to become familiar with it.

The publishers state that the original work seems to be gaining in public favor. The author will be gratified if the revised edition shall continue to enjoy it.

SCHENECTADY, N. Y., *January 1, 1900.*

PREFACE TO THE FIRST EDITION.

THESE lectures were delivered before the Senior classes at Union College during the four years in which the author was President *ad interim* of that institution. Partly narrative and partly expository, they are an attempt to present in a sort of perspective something of the story of the Constitution, its significance and development.

SCHENECTADY, N. Y., *March 4, 1889.*

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CONSTITUTIONAL HISTORY AND GOVERNMENT OF THE UNITED STATES.

CHAPTER I.

ENGLISH COLONIZATION IN AMERICA.—WHY THE COLONISTS WERE EAGER FOR SELF-GOVERNMENT.—OUTLINE OF THE RESULT IN THE COLONIES.

THE Constitution of the United States provides for the national government of all the states, as though all formed one. The constitution of every state provides for its domestic government as though it stood alone. Supplementing but not conflicting with one another, the two governments complete one system of national and domestic government. The government secures the liberty and safety of the individual, and the individual supports the power and stability of both nation and state. Tested by the experience of more than a century, the system is approved by its practical results. Improvements in details may be suggested by the reformer, but not in the scheme itself.

Before the American experiment was initiated, it was a cardinal rule of the political philosopher that a republic was practicable only in a state of small territorial extent. But the American republic gains in vigor and solidity with territorial expansion. The people are satisfied with the system and proud of it. This pride and satisfaction are elements alike of its strength and its excellence. It may not be the best scheme for every people who wish self-government; but in this age, no people intelligent enough to adopt self-government would undertake to do it without first making a careful study of our system.

The fundamental principle of the system is,—to make good

laws and rely as much as possible upon them, and to leave little for the officers to do except to administer the laws. Such a system seems to be simple; but its success is largely due to the fact that the germs of the system were planted with the planting of our colonies, and have developed, strengthened, and matured as an organic part of the American vitality, growth, and development. To change the system materially would be doing violence to the people. Peoples otherwise nourished and matured may not easily adopt and operate our methods. The athlete who first mounts his bicycle may meet with disaster, and may never attain to the skill of the youth who does not remember when he could not ride.

Our imitators in Central and South America fail as yet to get the best results from the system; but this seems to be so because the people are not habituated to give it or any other system an intelligent and steadfast support.

The American system will not work automatically, nor of itself produce good government. It simply affords the people the means and methods of good government, if they insist sufficiently upon having it. Without such insistence, or whenever or wherever it fails, the government deteriorates in quality. It is the interest of the many to prevent such deterioration, and, irrespective of the question whether the American people excel others in civic virtues, it is their habit to insist that the government shall be administered in the public interest, and they do this the more strenuously as the evil consequences of actual lapses become more clearly seen. The American system must therefore be studied with reference to the fact that the people fitted the system to themselves, and that the system in return powerfully coöperates in holding the people true to their original character, and in converting to their type the children born of foreign parents but reared upon American soil.

The Constitution of the United States now consists of two parts,—the text of the instrument, and the practical construction of the text. The first stands as originally written; the second is what we think it means, and the way we have adapted it to practical use. The text outlines the main scheme of government, such as the framers hoped would “secure the blessings of

liberty to ourselves and our posterity ; " the practical construction fills in those outlines with means and methods. Thus the Constitution is as old as its text, but new as need be for every new demand. To illustrate : the second article declares that " the executive power shall be vested in a president of the United States." To-day that power extends over Hawaii, the Philippines, and Porto Rico, and as the President is also " commander-in-chief of the army and navy," he directs the arms that maintain our power in the Philippines. In the instance cited the text declares the power ; we see the use made of it. Thus, while the text is old, this construction and application of some of its provisions have awaited the second century of its existence. It is plain that the better the ideas and experience which found expression in the Constitution, and the subsequent filling in of its outlines by practical operation, are studied, the better the Constitution will be understood.

The planting of free institutions by the English-speaking race in the wilds of America forms an epoch in the destiny of mankind. As the event recedes in time, its constantly widening results develop its importance.

An examination of our history, from the first settlement of the English colonies until the adoption of the Constitution of the United States in 1789, will, I think, show that free institutions were planted in the United States and developed and established in a very simple and natural way. Nearly a century and a quarter elapsed after the discovery of America before England really succeeded in establishing any colonies here. Spain had practically monopolized the western world. With the exception of the smaller parcel of South America allotted by the Pope to Portugal, Spain claimed the whole continent. She took possession of Florida, Mexico, Central and South America, and the West Indies. Her success in subjugating the natives and despoiling them of their wealth of gold and silver, in propagating the religion of Rome, in infusing the Castilian blood among the native races, was indeed striking. Before England made any successful efforts at American colonization, Spain seemed to have achieved the most brilliant suc-

cesses. Spain was then in the zenith of her greatness. She ruled the seas and dominated the greater part of the continent of Europe. She struck at England and failed. With the destruction of her great Armada in 1588, she began to decline. As Spain sank, England rose. England claimed some part of the North American continent. In 1496 John and Sebastian Cabot, navigators under the English flag, had coasted along the American shores from the headlands of Labrador to the capes of the Carolinas. But whatever title might accrue to England from the discovery of the Cabots, England was not able to protect, and therefore did not attempt it until she was able to cope with Spain. That time came about the beginning of the seventeenth century. It was fortunate that it did not come earlier. The destiny of North America was fixed by the Englishmen who were moulded and trained by the influences which sprang from the Protestant Reformation, and the separation of the English Church from that of Rome.

The sixteenth century witnessed the resurrection and diffusion of the ideas of liberty. In 1474 books were first printed in England from movable types. The learning of the world, hitherto buried in manuscripts, too few for general use and too costly for any except princes and rich religious houses, began to be accessible. Thus the New Learning began. The Bible was translated into English and printed on the Continent, and then circulated by stealth in England. It was long a crime to have a copy of it. Luther's book against the Pope was printed in 1521. The Protestant Reformation, started as a protest against some of the errors and abuses of the church, glided naturally into rebellion against it, and fought its way to supremacy in England and in some of the continental states, and to acknowledged belligerency in others. When opposing religious faiths furnish the ground of war, the opposing champions sharpen their minds as well as their swords. The right of private judgment and the sufficiency of the Scriptures as a rule of faith had to be defended in debate and by arms. Henry VIII. accepted the Reformation, but, being a king, he would not tolerate in his subjects the right of private judgment. But in 1536 he permitted the Bible to be printed in English and circulated, under



restrictions which he could but imperfectly enforce. He and his successors tried to confine the Reformation within such limits as they conceived would most strengthen the crown. But their subjects had begun to reason concerning their duty to God and themselves: this was strictly their own concern; the interference with it by an earthly king was an invasion of an individual right; their duty to God was paramount. Hence intellectual and spiritual rebellion,—the sort that defies temporal power. Persecutions followed. England became a Protestant state, with a large Catholic minority. Religious divisions became party divisions. The Church of England was established by law, but the Church of England embraced but one phase of Protestant faith and worship, and there were other phases. Numerous dissenting Protestant sects were formed; these the crown tried to suppress, but persecution and martyrdom strengthened them. When Henry VIII. threw off the supremacy of the Pope, his main purpose was to rid himself and England of obedience to an earthly potentate superior in religious affairs to himself. But he thereby opened up to the people the question of their religious liberty, and they could not uphold that without assuming their right to civil liberty. In 1534, by the Act of Supremacy, he became "The only Supreme Head on Earth of the Church of England." Some dissenters made bold to scout at any human supreme head, and their scouting was the more incisive when they pointed a finger at such a head. The making and changing of creeds began. The people could not help thinking for themselves. If the king ruled by divine right, possibly he might be the temporal head of the church, but any pretense that the immutable decrees of the Almighty respecting faith and worship shifted about as the king's mind changed challenged credulity, and shook the faith of many in his rule by divine right. The king maintained that with the help of his bishops he was the only one who had the right to think and determine. The clergy and laymen could not determine for the kingdom, but they could for themselves. The human mind, sharpened by the contest, realized its freedom. The Bible was finally set free. The common people had little else to read, and they read it gladly. It became to them not

only the Book of Life in a spiritual sense, but a storehouse of civil precepts. Dissenters from the Established Church multiplied. Among them the sectaries, nicknamed Puritans, were abundant. Their creed was leavened by the theology of Calvin. This theology is a germinator of democratic principles. It teaches men that they are ennobled as children of God ; that the poorest peasant is the natural equal of the proudest lord ; that kings are but men, and if they do not rule according to the law of God, they rule against right ; that the church on earth has no temporal head except in all the members of the congregation or in their free choice, and hence the claim of the Pope or king to be the supreme head is unfounded. From ruling a church by the advice of the congregation to ruling a kingdom by the advice of the people in Parliament was an easy step to a position long sanctioned by English theory, however obsolete in practice. The Puritans revived the idea and insisted upon it. One did not need to be a Puritan in order to support the pretensions of Parliament, and thus Paritan polities were destined to a greater ascendancy than Puritan forms and methods of worship.

When the king became the head of the church, his claim of spiritual supremacy gave an awful force to his claim of temporal rule by divine right. Many devout people believed that his dominion, complete on earth, extended to heaven. Why struggle against divine power ? Why not passively obey the king's command without the sin of presuming to question its rightfulness ? “ Render unto Cæsar the things that are Cæsar's.” It is written in Romans xiii., “ Let every soul be subject unto the higher powers. For there is no power but of God : the powers that be, are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God : and they that resist shall receive to themselves damnation.” But many said, “ This is written of lawful civil power, not of an unlawful claim to spiritual power, for is it not added, ‘ For rulers are not a terror to good works, but to the evil ’ ? ” and they asked, “ What things are Cæsar's ? ” The stake and the fagot threatened those who drew this distinction, but the brave in heart still dared to draw it.

Among these brave people there was one sect called Brown-

ists, from the name of their founder. A congregation of this sect, rejecting ceremonies as reliques of idolatry and bishops as unscriptural, and asserting their right "to walk in all the ways which God had made known or should make known to them," exiled themselves to Holland, and found refuge there. After twelve years of sojourn they sent forth in the Mayflower the Pilgrim Fathers to the larger liberty of the new world. These Pilgrims had no charter, and what else could they do but order their own government after their own hearts? "We are knit together," said John Robinson, their pastor, as he sent them forth, "as a body in the most sacred covenant of the Lord, of the violation whereof we make great conscience, and by virtue whereof we hold ourselves strictly tied to all care of each other's good and of the whole. It is not with us as with men whom small things can discourage." In this spirit they made their social compact, and thereupon developed their simple constitution by making such regulations as "tied themselves to all care of each other's good and of the whole."

In 1604 James I. became king. The Puritans had become strong in Parliament, and Puritan politics were in the ascendancy among the people. The Puritan Parliament demanded a redress of grievances both civil and religious, and insisted that Parliament alone should make the laws. King James, like his predecessors, insisted that he was king by divine right, and an absolute king. His predecessors had indeed claimed to be absolute kings, but they only meant that they were independent of the Pope and of all foreign powers. James claimed that he was absolute not only in this sense, but also in the sense that he was above both law and Parliament. James held that the people had no political rights, but might have such privileges as he should think proper to grant them. He thus declared his views of his power and duty: "As it is atheism and blasphemy to dispute what God can do, so it is presumption and a high contempt in a subject to dispute what a king can do, or to say that a king cannot do this or that." No human laws, no Magna Charta, no ancient or customary rule of liberty or right, could avail against such vast and mysterious power, if its divine authority were conceded. This device for the entire prostration

of the rights of men before the pretensions of kings seemed complete. The Dissenters challenged this doctrine.

In 1620 Parliament made bold to resolve, "that the liberties, franchises, privileges, and jurisdictions of Parliament are the ancient, undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, State, and defence of the realm, and of the Church of England, and the making and maintenance of laws, and redress of grievances which daily happen within this realm, are proper subjects and matter of council and debate in Parliament. And that in the handling and proceeding in those businesses every member of the House hath and of right ought to have freedom of speech to propound, treat, reason, and bring to conclusion the same." The king sent for the journals of the House and tore out the pages containing this resolution. He said, "I will govern according to the common weal, but not according to the common will." The king thought he was absolute, according to his construction of the term.

The contest thus sharply invited was to last long. It was to cost Charles I. his head, bring Cromwell to power, drive James II. from his kingdom, and to culminate in the revolution of 1688, with William and Mary upon the throne, with the divine right of kings exploded, and Parliament the supreme lawgiver of the kingdom. This long struggle taught the people their power and the means to use it. But in its earlier stages the hand of royal persecution was heavy upon the Dissenters, and many, despairing of success, followed the example of the Pilgrim Fathers, and exiled themselves to America. The Long Parliament, acting as a trial court, in 1641 condemned Charles I. to death, and cut off his head. This was an object lesson, perhaps more momentous in its influence upon popular liberty than any other personal event in profane history.

But before this epoch-making tragedy had occurred, 20,000 persons had escaped to New England. They brought with them Puritan politics, however it may have been with the Puritan religion. Puritan polities had become rich in its theories of human rights. The new world afforded a clear field in which to put these theories into practice. The fear of Spain

was gone. The king of England rejoiced at the voluntary exile of so many pestilent subjects. They were too numerous to be punished, and too dangerous to be left at home without restraint. They cast themselves adrift, and went forth sustained by their trust in God and themselves. They had patrons, syndicates for commercial purposes. These syndicates asked for charters; charters were but parchments, and the king gave charters to the syndicates, but with a definition of the rights of the colonists which proved flexible enough to enable them to take their liberties into their own keeping.

The difference between the impulse and methods of English colonization in America and that of the French and Spanish is significant. The English colonization was made by the people primarily for their own benefit; if any benefit should accrue to the parent state, that would be remote and incidental. French and Spanish colonization was made by the government with the intent to enrich and benefit it and its captains and governors, and only incidentally for the benefit of the colonists. The English colonist was neglected, and left to do as he pleased; the French and Spanish were rigidly supervised and regulated in both temporal and spiritual concerns. Individual liberty was subjected to the supposed interest of the state, or its favorites who were in control. The result was that the English colonist enjoyed a much larger liberty here than at home, while the French and Spanish colonists enjoyed much less.

That age of civil war, religious persecution, free inquiry, and spiritual unrest greatly stimulated the spirit of adventure. North America was its field. It had not been much explored beyond a day's journey from the sea. To enterprising and active spirits it had the charm of vast possibilities,—the lure of the gambling table. It was a land to be plundered, if plunder could be found. The wealth that Spain had extracted from Mexico and South America dazzled men's minds and excited their cupidity. The tide of emigration was great for that age. Many colonies were founded, every one of them possessing the idea of self-government. Some were narrow and illiberal to those of principles and sympathies alien to their own; but their people were founding colonies of kindred spirits; others could go elsewhere and do the like.

At first the exiles suffered. But the robust in body and the resolute in spirit survived, and finally began to prosper. They made regulations to suit themselves, and after a while obtained the power to make their own laws, subject of course to the veto of the crown, a veto which was rarely exercised. They were subjects in name, but they were sovereigns in fact. To make laws and to secure obedience to them is to exercise the functions of sovereignty. From the first half of the seventeenth century until the Declaration of Independence in 1776,—a period of at least four generations,—they practiced self-government, and thus acquired the capacity for it. The colonies had separate territories, and to some extent different systems. Their number and diversity distracted the royal attention. But their systems gradually improved side by side and became very much alike. They became a nation without realizing that they had been long tending in that direction. Surely, a great people of common race, origin, allegiance, language, customs, contiguity of territory, and similarity of government and institutions, lacked only the bond of a single organism for some object of general welfare to complete their national unity.

When they realized that they were all to be confounded together and devoted to the same oppression, they stretched out their hands to each other and found union in their grasp.

When, therefore, the colonies became ripe for independence, and rebelled against King George and declared themselves free and independent, they had before them no very difficult plan of reconstruction.

They made their constitutions by declaring their rights and powers as they had been accustomed to understand and exercise them. They erased the word "king," and wrote "people;" they changed their flag; they erased "colony" and "province," terms which implied dependence, and wrote "state," which implied sovereignty. And when, in the course of their struggle to make good their Declaration of Independence, they felt the importance of a compact union of the states, they tried to form a "a perpetual union" by the "Articles of Confederation."

This, however, was a new government, not so much over the people as over the states, the creations of the people. They

neither well understood how to make it, nor were they able to obtain the consent of all the states to make it quite equal to their own standard of excellence. They made it the creature and servant of the states. They did not see that national powers must be the powers of one sovereign, not those of the servant of many separate masters. But they were wise enough to recognize the defects of their first attempt, and to profit by their experience. Their statesmen studied the history and structure of other governments, and with rare good sense applied the lessons of history and philosophy to their own peculiar condition. How to present all the states as a single power to the world, and yet retain their separate power with respect to themselves and each other ; how to give to each state the united support and protection of all the states, and not sacrifice the autonomy of any state, became the master problem. Circumstances happily conspired with experience, good sense, and practical statesmanship to aid in its solution.

Nevertheless, when the national government for the common defense and general welfare of all was established by the Constitution, local self-government, assuming the name of state sovereignty, began to take alarm lest it should perish by the encroachment of the larger government. The alarm was magnified, and time, experience, and strife were necessary to show clearly the distinctions between the functions of the two governments, and to prove that the one is as much the creation of the people as the other, and that both are but essential parts of one excellent system. Finally, it has been made to appear that the national government is a necessary guarantee of proper local self-government, and that any tendencies to hurtful encroachment may be corrected within the Constitution, or in extreme cases by amendment of it.

CHAPTER II.

SELF-GOVERNMENT THE NATURAL RESULT OF THE CHARACTER OF THE COLONISTS UNDER THE CIRCUMSTANCES.—SETTLEMENT AND GOVERNMENTAL CHARACTER OF THE THIRTEEN COLONIES.

WE need not go far afield into the history of other ages and peoples and search out samples of free institutions, and then infer that the English colonists took them as models. We may rather assume that the main factors in the establishment of free institutions in America were the desire of so many people to escape from governmental oppression, and their hope to secure and enjoy liberty regulated according to their own ideas. Very many of the colonists were intelligent and earnest people. Some of them were graduates of Oxford and Cambridge, and well informed in respect to the governmental systems and institutions of the continent of Europe. Most of the New England colonists were readers of the one Book, and were perfectly familiar with its precepts, examples, and suggestions with reference to governments, laws, and methods, good and bad. In it they read about kings, princes, governors, judges, councils, counselors, rulers, ambassadors, messengers, agents, — that is, representatives, wise men, elders, senates and senators, provinces, colonies, and congregations. As necessity and responsibility pressed upon them from time to time, the wider their range of knowledge, the more apt they were to hit upon practicable methods. The English system was the model best known to them, but it was a model clogged with abuses. These must be avoided. The good could be secured by methods suited to their simple state. From the Bible, more than from other books, the New England colonists drew hints of ways and means which their pastors, skillful in the art of application to their actual condition, helped them to reduce to practice.

Some writers are fond of thinking that a trace of modern

systems of representative government exists in the brief record which Tacitus gives us of old Teutonic methods.¹

To seek in the rude assemblages of uncivilized tribes the germ of the refined methods of the highest civilization is a fascinating pursuit; but it is doubtful whether the meagre facts afford us more than food for speculation. That the heads of families often consulted together to concert a common attack or defense, and that a leadership should be accorded to one of them, and that this leadership should, if successful, be recognized afterwards in future consultations upon common needs, may readily be believed.

We cannot assume the equality of men in the natural qualities of leadership, though we can easily understand that when that leadership is acknowledged, its possessor may be wise enough to strengthen it by deferential consultation with those who conferred it.

The dependence of the colonists upon the crown had its advantages. It protected them from foreign invasion, and from the danger of the usurpation of authority by any ambitious tyrant among themselves. The crown, in granting charters to companies, as in the case of most of the earlier colonies, or commissions to royal governors after the charters were superseded, or territories with the power of government, as to Lord Baltimore and William Penn, delivered over the government to the company or persons named in the parchments containing the grants. These newly created governing companies, or governors, or proprietors, took their first practical lessons in colonial government in the colonies, with the result that the colonists moulded them. Even William Penn, if an exception to this rule, is so only in the fact that he was wise enough to learn in the first instance from the experience of the earlier colonies, and afterwards to modify or correct his system by experience in his own.²

¹ When two or three or even hundreds come together in friendship, friendly methods naturally follow, and unless pursued, the friendship is broken. That the narration of Tacitus is so much cited is not because the facts are of an exceptional kind, but because his style of narrative is striking, and narratives of the unlettered tribes of that age are rare.

² "Our colonies," says Blackstone, writing in 1765 (1 Com. 108), "are properly

Whatever the charter or form of government, it was inevitable that in the beginning the colonists, because of their character, their purpose, and circumstances, would largely mould the government. With few exceptions they were neither soldiers under military command nor servants under taskmasters. They were not ambitious of exercising power. They simply desired that power should be so regulated as to make it most useful to themselves, and to do this they took a large part of it into their own hands. They had natural liberties and they valued them. Their weakness and their wants constrained them to unite and help each other. They had aspirations for governmental liberty and they cherished them. Their equality of condition made them just to each other. Merit and not birth naturally proved to be the best title to respect. This equality prevented the growth of an aristocracy and led to equality of inheritance. They desired liberty of conscience for themselves, and finally saw that this could best be secured by conceding it to others. An ocean separated them from England and from its interference. Out of the royal sight, they were out of the royal mind, and so, too, the fear of the king was

of three sorts: 1. Provincial establishments, the constitutions of which depend upon the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary governments, granted out by the crown to individuals in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation which formerly belonged to the owners of counties palatine; yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3. Charter governments in the nature of civil corporations, with power of making by-laws for their own interior regulation, not contrary to the laws of England, and with such rights and authorities as are specially given them in their several charters. The form of government in most of them is borrowed from that of England. They have a governor named by the King (or in some proprietary colonies by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the King and council here in England. Their general assemblies, which are their house of commons, together with their conseil of state, being their upper house, with the concurrence of the King or his representative the governor, make laws suited to their own emergencies."

Blackstone takes no notice of the colonies of Rhode Island and Connecticut, where the people elected the governor and council. But what were these among so many?

the more out of their minds. They were thrown upon their own resources, and had to take care of themselves or perish. Their necessities were the higher law, and when it was necessary the charter must be stretched to suit their needs. They naturally construed their charter or their governor's commission most favorably for themselves. Circumstances and their dispositions encouraged them to take large liberties in their methods and laws. It made no practical difference whether the crown conceded such liberties or tolerated them. Their laws had to be adapted to their views and situation. With such men under such circumstances, success or failure depended upon themselves. A fairly good system of government was essential to their success, and the system was initiated, and grew and improved with the growth and prosperity of the colony. The need suggested the remedy. Improvement followed as effect follows cause. The habit of self-government developed a capacity for it. The people profited by the suggestions of experience, and as successive colonies were founded, the experience of the earlier was helpful to the later. Each one was in some measure instructive to all.¹

The American experience begat what we now know as American fertility of resource, and gradually led to most excellent results. The general system of government was well known. Executive, legislative, and judicial functions must be exercised. The colonists began to perceive what governments have been long and slow in learning: that it is wise to commit these functions to separate bodies of men so far as it is practicable to do so.²

It was a part of the Puritan creed of government to keep

¹ Thus the "Duke's Laws," promulgated in 1665 "for the public use of the territories in America under the government of His Royal Highness," James, Duke of York, afterwards James II., recited that they were "collected out of the several laws now in force in His Majesty's American colonies and plantations." (Colonial Laws of New York, vol. i. p. 7, ed. 1896.)

² That the judicial office should be separated from the executive is thus expressed in the instructions given in 1683 by James II. to Colonel Dongan, "Governor of New York and its dependencies in America : " " You shall not displace any of ye judges, justices, sheriffs or other officers or ministers within New York or its dependencies under your government without good cause, nor execute yourself or by a deputy any of the said offices, nor suffer any person to execute more offices than one by deputy." (Colonial Laws of New York, vol. i. p. 110, ed. 1896.)

the purse, and thus the legislative power, in the hands of the people. Nothing could be added to the precepts of Moses as to the need of purity in the judicial office. English kings had taught that the powers of government were of such divine origin that they would be profaned if committed to men not ennobled by the gracious favor of the Lord's anointed. The colonists read that,¹ "Their nobles shall be of themselves and their governor shall proceed from the midst of them," and they soon learned that the art of good government is not a mystery when the governed themselves undertake it with the single purpose of ministering by it to the common needs of well-ordered lives.

A reference to the manner in which the colonies obtained self-government and administered it will disclose the foundation of much that now exists in our national and state constitutions.

Virginia was the first colony. Its settlement was a commercial affair, conceived and undertaken for profit. James I., willing to strengthen by occupation his claim of title to the territory which the Cabots had discovered, granted a charter to a company of noblemen, gentlemen, and merchants, and the company procured one hundred and five men, unaccompanied by their wives or families, to emigrate. The charter vested the law-making power in the crown, and the power of administration in a superior council in England appointed by the king, but represented by a local council in Virginia. The colonists, except those appointed to the local council, had no voice. They were guaranteed the right of trial by jury, and such rights as are vaguely implied by their continuing to be Englishmen. The Church of England was to be established. The tenure of land was to be upon favorable terms, but for the first five years there was to be a community of property. Few were willing to labor; most were incompetent, and the expectation of finding gold rendered nearly all improvident. Forty-eight of the settlers were rated as gentlemen. The famous John Smith fortunately was one of the local council, and although he was expelled by his associates upon the charge of sedition, he was soon restored, and by virtue of his natural gifts

¹ Jeremiah xxx. 21.

of leadership, assumed the charge of the government. Death depleted the colonists, but Smith, by his wisdom and vigor, managed to preserve a remnant from extinction. Having been wounded, he was obliged to return to England. He besought the company to send out intelligent mechanics and laborers. But the company was eager for gold, and sent out those who were eager to find it. The idle and the vicious rapidly succumbed beneath the miseries induced by their own improvidence, and the colony was again near extinction, and about to be abandoned, when the arrival in 1610 of new emigrants and further supplies averted the contemplated abandonment. For nine years longer the colony, though amply reinforced by immigration, struggled against bad government and general discontent. Twice the charter was amended in the interests of the company. The council was authorized to make the laws and appoint a governor. Afterwards the members of the company and the governor were vested with the powers of government; the governor to be assisted by a council or committee chosen by the company. The company could admit aliens to its membership, and thus we have the germ of naturalization, and of the qualification for the right of suffrage.

Finally, the people, instructed by the miseries they had suffered and encouraged by the growth of the Puritan politics in England, rose to the emergency and demanded that "they might have a hand in the governinge of themselves," through a general assembly, to consist of the governor and council with two burgesses from each plantation, freely to be elected by the inhabitants, and that this assembly should make the laws. The London company granted the demand. Thus the colonists followed English example, and through their local parliament began to participate in the government. In June, 1619, the first popular legislative assembly that ever met in America convened in Jamestown. It consisted of twenty-two burgesses chosen from eleven towns, or boroughs. Thus self-government began. It may have been crude, but it would live and become better. The privilege conceded to Virginia became a precedent for other colonies. The concession made by the London company was simple and natural. Its importance to America and

mankind probably did not occur to any one. Gradually there grew up in the crown office in England a system of colonial government in which the representation of the people in their local legislatures became a customary part. We find James II. in 1685 objecting to the claims of the first legislature of the province of New York put forth in their "Charter of Liberties and Privileges," because, as the record runs, "these liberties and privileges are not so distinctly granted to any of His Majesty's Plantations."

The London company was dissolved in 1624, and its powers were resumed by the crown, which changed the charter government of Virginia to a provincial government. The crown appointed the governor and a council, and recognized and approved the popular assembly. Thereafter the colony enjoyed a government partly regulated by itself, which gradually developed into a system of self-government. From this system the first constitution of the state was adapted. Virginia prohibited by law any dissent from the Church of England, but the law was not rigidly enforced. In 1776 dissenters formed two thirds of the population.

Virginia was more a theatre for men of spirit than for the spiritually disquieted. Large plantations and numerous slaves made the planters tenacious of their rights and liberties. They were loyal to the king, for he was the first gentleman in rank and place, and loyalty, according to their conception of it, honored them and involved no sacrifices. The celebrated Navigation Act of 1662 troubled them sorely. It was a great wrong. This act imposed a tax of five per centum upon all imports and exports, and prohibited to the colonies all commerce except with England and each other. This act the colony attributed to Parliament rather than to the king. Virginian statesmen early began to question the claim of Parliament to control the colony. The colonists were the subjects of the king, but not of Parliament. Their early charters had been given by the king, not by Parliament. The king appointed their governor. They had a parliament of their own in their legislative assembly. The English Parliament, they came to think, had no more jurisdiction over Virginia than the General

Assembly of Virginia had over England. In the seventeenth century, when most of the charters were granted, Parliament had nothing to do with them. Every colonial grant and government emanated directly or indirectly from the king. There was apparent force in the contention that the claim of Parliament to govern the colonies was a pretension at variance with the ancient constitution of England. But by the revolution of 1688, the claim of the crown to govern the kingdom of Great Britain independently of Parliament forever ended. The theory of the Virginian statesman was that the king was king in Virginia as well as in England, and the legislative assembly was the colonial parliament. The king, represented by his governor and council, and the colonial assembly constituted the government. As England, by virtue of her naval supremacy, had control of the high seas, the navigation acts might be defensible, but any claim of Parliament to impose taxes in Virginia clearly was not.¹

The promptness with which Virginia made the cause of Massachusetts her own in the contentions that preceded the Revolution is a sufficient proof of the robust, intelligent, and generous spirit of independence which her century and a half of colonial training had inbred in the Virginians. The action of Virginia was decisive of the character and success of the revolt which ended in revolution and independence.

The evolution of self-government in Virginia made it easier for the New England colonies to obtain it. The Pilgrims who founded Plymouth had to devise their own system of government, make and administer their own laws, or subsist without any. The colony was small, but from 1620 to 1684, a period

¹ Jefferson, as a member of the Convention of Burgesses, in his draft of "Instructions" for the delegation from Virginia to the first Continental Congress, said that the king only, and not Parliament, had anything to do with the colonies. The king, he said, was the first magistrate of the empire, and the colonists were his subjects; that our Saxon ancestors left their native wilds and migrated to England without any pretense on the part of their mother country of any superiority over them in their new homes. So when the colonists left their mother country, the same result followed, except that the colonists chose to recognize the king as their king, but they never recognized Parliament, because they had parliaments of their own. One free and independent legislature could not suspend the laws of another as free and independent as itself. (*Jefferson's Works*, vol. i. p. 125.)

of sixty-four years, it exercised, without hindrance from the crown, the functions of self-government. The people elected their governor and council. At first all the male inhabitants united in making the simple laws by which they consented to be governed. Afterwards, as the settlements extended into the wilderness, it was inconvenient for all the freemen to assemble in the general court for the purpose of making laws, and naturally they preferred to select one or more persons from the several townships to represent them. The House of Commons in England furnished the idea of representative government. In Plymouth the woods and bad roads made it necessary to adopt it. The colonists, in 1629, procured a patent or charter from the Plymouth Company in England, giving them the privileges of self-government, subject to conformity to the laws of England. This was never confirmed by the crown, but it was claimed by the colonists to be a sufficient charter. In this small colony popular government reached a high degree of excellence. That is, the government was for the governed, and suited them. Of course the church of their affection was amply provided for; public schools were maintained, and the rights and liberties of the people protected in accordance with the principles of the common law. Various delinquencies denounced by the Scriptures, which modern legislation does not much regard, were placed under the ban of the law. In 1691 the Plymouth colony was merged with that of Massachusetts under the charter granted to that colony by William and Mary.

The example of Plymouth led to the establishment of the colony of Massachusetts Bay. Many Puritans in England desired to worship with the freedom and very much in the form of the Plymouth Pilgrims. They did not dissent from the articles of faith of the Church of England, but they regarded her ritual and discipline as unscriptural, and her sacraments and ordinances invalid.¹

¹ The Rev. Richard Mather, grandfather of the more celebrated Cotton Mather, came to Boston in 1635. He stated his reasons for leaving England as follows: —

“I. A removal from a corrupt church to a purer.

“II. A removal from a place where the truth and professors of it are persecuted unto a place of more quiet and safety.

“III. A removal from a place where all the ordinances of God cannot be enjoyed unto a place where they may.

The New England charter of 1620 was granted by James I. to forty lords and gentlemen. It constituted them a body politic and corporate "by the name of the Council established at Plymouth in the County of Devon for the planting, ruling and governing of New England in America." It practically vested all governmental power in the corporation, and the corporation was resident in England. The territory granted lay between the fortieth and forty-eighth parallels of latitude. In 1627 this corporation sold to John Endicott and five others all the land from three miles north of the Merrimac River to three miles south of the Charles River, from the Atlantic to the Southern Ocean. Endicott with other colonists settled at Salem in 1628, Endicott acting as governor. The Plymouth Council could sell their land, but could not confer the power of civil government, and hence an application was made to the king for a charter, which Charles I. granted in 1629 to Endicott and twenty-nine others. The government was vested in the company, to be exercised by a governor, deputy, and eighteen assistants, who were to be elected by the freemen of the company. The company was authorized to admit as freemen whomever it saw fit.

The germ of the republican form of government, although not suspected by the king or his advisers, lurked in this power to admit freemen. If narrowly exercised, the few members of the company would constitute an oligarchy with absolute power. If freely exercised, power would practically pass to the people. The colony attracted the attention of Puritans of wealth and position. They said to the company in England, "Transfer your charter and powers of government to such members of the company as reside in New England and we will go thither." In 1629 the company in England resolved "that the charter should be transferred and the government be settled in New

"IV. A removal from a church where the discipline of the Lord Jesus Christ is wanting unto a church where it may be practiced.

"V. A removal from a place where the ministers of God are unjustly inhibited from the execution of their functions to a place where they may more freely execute the same.

"VI. A removal from a place where there are fearful signs of desolation to a place where one may have well grounded hope of God's protection."

England." The next year fifteen hundred persons from England joined the colony. One hundred and nine of them were at once admitted as freemen, and rules were adopted under which nearly every male colonist, a member of their church, of mature age, and of self-supporting means or occupation, became a freeman, and thus entitled to a voice in the election of the officers of the colony. In 1634 it was found impracticable for all the freemen to attend the general court, and it was resolved that each town might send its representatives.¹

Naturally the colonists, in establishing their homes, selected lands with reference to the association of each congregation in one neighborhood. The congregation kept a watchful charge over every member in matters of religion, opinion, example, and business, to the end that unthrift and ungodliness might not sap their physical and spiritual welfare. Thus they evolved the township with its self-government.² The result was that from 1629 to 1684 Massachusetts had such a frame of self-government as she desired. The stormy times which prevailed in England during the reign of Charles I. favored the colonists. When Cromwell became protector, he treated them more as friendly allies than as dependent subjects. Charles II. did not

¹ "The people began to grow uneasy, and the number of freemen being greatly multiplied, an alteration of the constitution seems to have been agreed upon or fallen into by a general consent of the towns, for at a general court for elections in 1634, twenty-four of the principal inhabitants appeared as the representatives of the body of freemen, and before they proceeded to the election of magistrates, the people asserted their right to a greater share in the government than had hitherto been allowed them. . . . The freemen were so increased that it was impracticable to debate and determine matters in a body; it was besides unsafe on account of the Indians, and prejudicial to their private affairs to be so long absent from their families and business; so that this representative body was a thing of necessity, but no provision had been made for it in their charter." (Hutchinson's History Massachusetts Bay, p. 35.) This is a narrow construction. Under the maxim that what one does by another he does himself, representation was authorized. That the colonists thus applied the maxim shows their aptness in adjusting their methods to their needs. The governor and his assistants or council formed one legislative chamber and the representatives another.

² In the New England colonies the town became and has remained the unit of representative and local self-government, exercising pursuant to the powers conferred by the colony, magisterial, police, educational, and prudential functions. The county was a later organization,—a judicial and military district, with such other more general powers as the colony or state confided to it. The county in New England has never attained the importance which it possesses in other states of the Union.

like their independent spirit and methods, but they appealed to their charter, and claimed that they kept within it. The king did not think so, and finally determined to take it away, and caused a suit to be brought for the purpose, alleging their violation and abuse of it. After a long struggle, judgment was pronounced in 1684, vacating and annulling it.

From 1685 to the fall of James II., the people of Massachusetts and of the other colonies felt the weight of royal oppression. But when the news of the fall of James and the accession of William and Mary reached Massachusetts, the people seized and sent the royal governor to England, restored their former governor to power, and then prayed the crown for a restoration of their charter. The other New England colonies, with the exception of Plymouth, were permitted to resume their former charters. Plymouth was small and, as we have already seen, the king consolidated it with Massachusetts.

King William would not restore the ancient charter to Massachusetts, but in 1691 he granted the colony a provincial charter. This provided that the crown should appoint the governor and judges, the governor to convene and dissolve the legislature, with power to veto its enactments, with further power of veto reserved to the crown. Every form of Christianity except the Roman Catholic should be tolerated. The charter was changed, but not the spirit of the people. Henceforth the people practically controlled the governors. The new government was in effect much like the old, except that it was more liberal in matters of religion, and thus was improved. Three quarters of a century after the grant of the provincial charter, the people, in their resistance to the series of attempted infringements upon their accustomed liberties, boldly undertook to maintain them, and thus brought on the struggle for independence.

Rhode Island was founded by Roger Williams and others in 1639. Williams was a minister at Salem, and dissented from some of the doctrines and methods of the Massachusetts churches. He was young and radical, and the church at Salem visited upon him and his adherents "its great censure." He went to Rhode Island; numbers accompanied and followed him.

Experience and reflection enlarged his understanding and charity. He founded a republican colony, with an open welcome to all who came. He was permitted, through a life long preserved, to benefit his colony by his wisdom and benevolence, and to give to mankind an example of toleration which bore abundant fruit. The government "in civil things" — not in religious, except that all were free to believe and worship as they chose — was administered by the towns until 1663, when a republican charter was granted, and this charter, upon the Declaration of Independence, was made the constitution of the state, and remained practically unchanged until 1841.

In 1633 the Reverend Thomas Hooker and two hundred others with him came over from England and settled at Newtown, Massachusetts. They had positive views about methods of government and worship. They found that the magistrates were assuming great power; that the representatives of the people did not object, and these peculiar people feared that the government might trench upon their freedom. They sought and obtained leave upon the alleged ground of "straitness for want of room" to migrate to the Connecticut River. Thither they went in 1636 and founded Hartford, Wethersfield, and Windsor. In 1639 the male adults of the plantations to the number of two hundred assembled in Hartford and adopted a written constitution for the colony of Connecticut. This was the first carefully elaborated written constitution prepared and adopted by the people for their own government. The compact signed by the Pilgrims on board the Mayflower was an agreement combining the signers into a "civil body politic," with the powers of government, but without specification of its methods or system. In its preparation we may assume that Hooker and his flock had the aid of the charter of Massachusetts, the methods adopted by the Pilgrims at Plymouth, the system in Virginia, and the constitution of the Netherland republic. As Hooker was a man of great ability and learning, he probably was familiar with the history of governments ancient and modern. He grasped the true idea of popular government, and through the first constitution of Connecticut gave it to the world. This constitution provided that there should be chosen annually by

the ballots¹ of the freeman, a governor and six assistants, who should "have power to administer justice according to the law here established, and for want thereof according to the rule of the word of God." Also that there should be two general assemblies or courts annually, to which each of the towns should send four deputies, to be chosen by the ballots of the freemen; that new towns might be admitted, with deputies to be apportioned according to the number of their freemen. All persons who were inhabitants and freemen, who took the oath of fidelity, should be entitled to vote. The general court should have supreme power to make the laws. It is important to observe that the towns were organized before the constitution of "the public state or commonwealth" was adopted; that the state was not formed to organize or regulate the government of the towns, but to enable the people of the towns in their confederate capacity the better to coöperate for the public defense and general welfare; that no power was taken from the towns by uniting their powers, except such as was incidental to a new and central power having jurisdiction of the general welfare. The resemblance of this constitution in its origin, objects, and methods, to that of the Constitution of the United States is remarkable. No reference was made to the king or any superior earthly authority.²

¹ It remained for the nineteenth century to introduce the ballot in the parliamentary elections in England.

² Hooker's clear conception of the idea that all governmental power is derived under God from the people was remarkable for that age. Before the constitution of 1639 he wrote, "It is a truth that counsel should be sought of the councillors. But the question yet is who those should be. In matters of greater consequence which concern the common good a general council chosen by all to transact businesses which concern all, I conceive most suitable to rule and most safe for relief of the whole." The following skeleton of a sermon preached by him at Hartford, May 31, 1638, was taken and preserved by one of his hearers: —

"Text, Deuteronomy i. 13. 'Take you wise men and understanding, and known among your tribes, and I will make them rulers over you . . . captains over thousands, and captains over hundreds, over fifties, over tens,' etc.

"Doctrine 1. That the choice of public magistrates belongs unto the people by God's own allowance;

"2. The privilege of election which belongs to the people therefore must not be exercised according to their humors, but according to the blessed will and law of God;

"3. They who have power to appoint officers and magistrates, it is in their

The colony of New Haven was settled in 1638 by a numerous band of dissenters who, preferring a still more theocratic government, went apart by themselves. They had no charter, and entered into a voluntary compact upon the model of Connecticut, with which colony they were united under the charter granted by Charles II. in 1663 to Connecticut. This charter was absolutely republican in form, and was modeled upon the constitution of 1639.

For the whole century before the revolution, Rhode Island and Connecticut testified to the other colonies that government popular in all its parts could be maintained and was a blessing to the people. Connecticut made her charter her state constitution, and continued it until 1818.¹

New Hampshire was founded in 1635 by men who were in sympathy with the Puritans, but were of a more worldly disposition. The colony was distracted by rival claimants and by conflicting jurisdictions. It was governed part of the time by Massachusetts, and desired to be permanently annexed to that jurisdiction. But the settled dislike of Charles II. to Massachusetts finally resulted in his making it a separate province, and placing it under a royal governor and council, and a popular assembly. It was practically a border district of Massachusetts, and sympathized with her republican principles and copied her methods.

power also to set the bounds and limitations of the power and place unto which they call them.

"Reasons. 1. Because the foundation of authority is laid in the free consent of the people;

"2. Because, by a free choice, the hearts of the people will be more inclined to the love of the persons chosen, and more ready to yield obedience;

"3. Because of that duty and engagement of the people."

Thus this pastor of a little flock in the wilderness, pondering over the methods of the civilizations from which he had fled, and illuminating his conceptions of the rights of men by the word of God, prepared himself and his people to frame the "Fundamental Orders," which were destined to help America on her way to liberty and to shape the constitutions of her future.

¹ Connecticut has been reproached for the alleged narrowness of her colonial legislation. In the preface to the Revised General Statutes of Connecticut, it is stated that the so-called "Blue Laws" of the colony are the fiction of the same "Tory historian" who published the statement "that at Bellows Falls the waters of the Connecticut river were compressed into such density as to bear up an iron crowbar."

Maryland was settled in 1632. The territory and its government were granted to Lord Baltimore. The grant gave him the power of appointing the governor and judges, and the pardoning power, and required that the laws of the colony should receive the assent of the freemen in their assembly, but reserved no veto or power to suspend them. Thus a feudal principality was established, tempered with popular sovereignty.

Lord Baltimore designed his colony as an asylum for the Roman Catholics, who were also the victims of persecution in England. Large numbers of them migrated to Maryland. The land was good and easily subdued; the proprietor was wise and benevolent, and the colony prospered. The government tolerated religious opinion of every kind. Protestants also came, and in numbers so large that in 1654 they were able to abuse the kindness shown them. They obtained control of the assembly, deposed the proprietor's governor, refused the Catholics protection, and proscribed their worship. Seven years later the proprietor was restored to his rights, was again deposed in 1688, and again restored in 1716. Lord Baltimore's family retained proprietorship until 1771, when it became extinct. These dissensions affected the colony unhappily, though its prosperity was never permanently arrested. Delaware was embraced in the grant to Lord Baltimore, but was claimed by William Penn under a later grant. It was severed from Maryland in 1762, and awarded to Penn. The Protestants, finally attaining power, made good their intolerant proscription of the Catholics. Popular government, after all, is no better than the will of the majority.

The civil war in England, and the ascendancy, first of Parliament and then of Cromwell, suspended for years the establishment of new English colonies.

The death of Cromwell and the restoration of Charles II. restored the old order of monarchy by divine right, and subjected liberty of conscience and worship to the intolerance of the party of the Established Church, intoxicated by its return to power. The disquieted again turned their attention to America. But, including the Dutch settlements in New York, New Jersey, and Delaware, the whole seacoast from Nova Scotia to North Caro-

lina was engrossed by existing jurisdictions. The Carolinas were practically vacant. Pennsylvania was far inland, and England had not yet determined to seize the Dutch possessions. The Carolinas seemed to present an available field for colonial enterprise, and theorists and speculators united in experimenting with it.

In 1663 Charles II. granted to a company of noblemen the territory of North and South Carolina, with powers of government similar to those conferred upon Lord Baltimore over Maryland. A few settlers already inhabited the northern part of the territory. The new proprietors, in the spirit of business competition, offered liberal inducements in the form of liberty and land to immigrants. Their seductive advertisements attracted adventurers, impatient of the restraints of civilization. These gathered into the territory of North Carolina in sufficient numbers to dominate it for a long time. The proprietors did indeed devise with great care what they supposed were most wise and liberal schemes of government, but the people cared little for paper constitutions, and not much for the laws. They suspended the collection of debts, imposed a tax upon lawsuits, confirmed their own titles, and made marriage a civil contract. They had liberty in its cruder methods, which experience and responsibility would improve.

The proprietors intended to make the constitution of the Carolinas a model of excellence, worthy the imitation of mankind. The celebrated philosopher, John Locke, brought to its elaboration the powers of his intellect and genius. It was the production of the closet, and had to give way to the simple demands of a rugged pioneer colony. Its chief uses have been to teach that theories in government must be fitted to actual conditions, or fail. It provided for numerous great officers of state, for a grand council; for counties, seigniories, baronies, precincts, and colonies; two classes of hereditary nobility were to exist to support the grandeur of the state; the proprietors were to choose deputies to represent their power and protect their interests; and the freemen were to choose their representatives,—these three orders were to constitute the parliament. Regulations were prescribed for churches of every kind; slavery

was to be established. Peace, prosperity, piety, and virtue, with grandeur, dignity, and liberty, were the lofty aims of the "Fundamental Constitutions."

A new government over a newly gathered people must reflect the genius, aims, and habits of that people, or fail, unless it is supported by military power. Locke's constitutions, like a defective machine, would not work. The colonists paid no regard to them. They enjoyed the freedom of the forests, righted with a strong hand their own wrongs, grew wiser and better as they increased in prosperity. Persecuted religionists found a sanctuary among them. They allowed the Church of England to be established by law, but this simply meant that those who preferred it should not be molested. Rude as the early career of North Carolina was, probably no other colony developed a sturdier race of liberty-loving people. Their rough and innate love of justice secured and protected those who lived peaceably and honestly. The proprietary government nominally lasted until 1729, when it was superseded by a provincial form of government, with the customary royal governor, council, and popular assembly. But North Carolina never long suffered any government to subdue or suppress her liberties, and when the Revolution drew nigh, she was ready and eager to throw off all allegiance to Great Britain.¹

South Carolina gathered her population from both the Puritan and Cavalier ranks of England, from the Dutchmen of New York, who lamented over the surrender to the English, from Holland also, from persecuted Presbyterians of Scotland and Ireland, and from the distressed Protestants of the continent of Europe. The Church of England was established by law, but every Protestant religion was tolerated.

The colonists soon became discontented with the proprietors,

¹ Delegates from different sections of Mecklenburgh County, N. C., assembled May 20, 1775, and resolved: —

"1. That whosoever directly or indirectly abets or in any way, form or manner, countenances, the unchartered and dangerous invasion of our rights, as claimed by Great Britain, is an enemy to this country — to America — and to the inherent and inalienable rights of man.

"2. We do hereby declare ourselves a free and independent people. . . . To the maintenance of which independence we solemnly pledge to each other our mutual coöperation, our lives, our fortunes and our most sacred honor."

and, after long dissensions, in 1720 rose in revolt, deposed the proprietary governor and chief justice, and appointed, in the name of the king, a governor and chief justice of their own choice. The English government approved the action of the people. The king thenceforth appointed the governors of the colony, but the assembly practically became the ruler.

In 1681 Charles II. satisfied a debt which the crown owed to Admiral Penn for cash advances as well as for great services, by giving the territory of Pennsylvania to the admiral's son, William. For the king this was like giving a bird in the bush, but to William Penn it became the gift of a great estate, a great opportunity for usefulness, and for acquiring a great name among the founders of states and the benefactors of mankind. Penn was endowed with a just and benevolent spirit and great practical wisdom. Vested with ample powers of government, he framed his constitution upon the basis of justice, equality, popular representation, toleration of religious opinion, brotherly love, and honest dealing with the Indians. He studied the systems of the other colonies and their practical results, and, unlike John Locke, perceived with a sort of intuition which of their methods should be adopted, rejected, or modified.¹

Penn's constitution as amended — the last time in 1701 — is a fair specimen of the results of the evolution of the colonial system at that date. It was the basis of the constitution of the state framed immediately after the Declaration of Independence.²

¹ In his first "Frame of Government," promulgated in 1682, he said, "I do not find a model in the world, that time, place, and some singular emergencies have not necessarily altered; nor is it easy to frame a civil government that shall serve all places alike. I know what is said by the several admirers of monarchy, aristocracy, and democracy; I choose to solve the controversy with this small distinction and it belongs to all three; any government is free to the people under it (whatever be the frame) where the laws rule and the people are a party to those laws, and more than this is tyranny, oligarchy or confusion. . . . The great end of all government is to support power in reverence with the people, and to secure the people from the abuse of power."

² Penn's character as drawn by Macaulay is charged with duplicity, meanness, and treason. Penn was a friend of James II. and a follower of George Fox. Macaulay hated the one and despised the other, and he transferred to Penn some of the meaner qualities which he delighted to impute to the last of the Stuarts, and to the first of the Quakers. But Penn's great place among the benefactors of mankind is immovably fixed, notwithstanding the assaults of the brilliant historian.

Penn's system succeeded because the Quakers, who formed the largest portion of the earlier population, were thoroughly in sympathy with its humane spirit. Pennsylvania became the abode of peace and prosperity. Her greatest troubles resulted from her landed system. Penn and his heirs owned the land, and reserved to themselves a small rent upon the parcels granted to the colonists. The proprietors from time to time extinguished the Indian title to additional lands at the public expense. The people in their assembly claimed the right to tax the unoccupied lands thus acquired by the proprietors ; this the proprietary governor strenuously resisted ; the contest was long, and gave occasion for other disagreements. The pen of Franklin has preserved to us a graphic account of these conditions, chiefly interesting now as an illustration of the influence of interest and training in educating a simple people in the art of wielding the government to their own advantage. After the colony became a state, the rights of the proprietors were extinguished by purchase.

The Dutch colonization of New York, begun in the order of time next after that of Virginia, promised little for liberty. The Dutch West India Company was the open rival of the French in Canada in the fur trade with the Indians. The company was vested with full powers of government. It selected its governing and managing agents with reference to its commercial interests, and although it sometimes consulted the representatives of the people, it did so in its own interests and not in theirs. The Dutch were accustomed to a government which conceded liberty of conscience and secured to them the fruits of their labor. Granted these, they cared little who were their governors or what was the form of their government. The trading-post attracted other adventurers than those in the service of the company, and English as well as Dutch emigrants came into the colony.¹

The governor permitted them to form settlements in the pro-

¹ "Forasmuch as the city of New York, the Metropolis of this Province, was chiefly erected by the inhabitants thereof for the propagating and encouragement of trade and commerce." (Colonial Laws of New York, vol. i. p. 269, ed. 1896.)

vince, usually upon condition that twenty families should unite together, obtain title from the Indians, pay after ten years one tenth of their produce to the company, and abstain from manufacturing and from trade with the Indians, except with his consent. These settlements constituted towns, in which government was administered by *schepens* and *schouts* (justices of the peace and police officers), after the manner then prevalent in Holland, except that the governor usually appointed these officers upon the nomination of the freeholders. Thus was laid the foundation of the town system now existing in the middle and western states of the Union.¹

The laws of Holland prevailed, except as modified by the arbitrary rules of the governor and his council. The colonists yielded a scant and sullen obedience to the exactions of the government, and constantly struggled for representation. When there was danger from Indian or foreign wars or a deficiency

¹ In England the word "town" in its popular sense means a congregation of dwelling-houses and the land immediately about them serving their convenience. (*Elliot v. South Devon Railway Co.* 2 Exchequer Rep. 725.) No special governmental rights or privileges are implied. Such rights or privileges, when they exist, proceed from ancient charters or from acts of Parliament. The families of freeholders made up a town or titling, ten tithings composed a hundred, an indefinite number of hundreds made a county. (1 Blackstone's Com. 115.) When the New England colonies were founded, such charters and acts were mainly limited to specified cities, boroughs, and ports. In New England the town had its origin in the congregation with dwellings within a mile of the meeting-house. The laws of the colony vested special powers of government in each town according to its special needs, and thus these laws became equivalent to charters; thence the New England town government. Every town became for all substantial governmental purposes a city. "They are towns corporate, having the power of choosing their own officers, and sending members to the general court, with jurisdiction over all their local and prudential concerns, of making by-laws, and assessing and collecting taxes." (*Hill v. Boston*, 122 Mass. Rep. 355.)

In New York, under the Dutch government, two methods of creating towns existed. One was by letters patent issued by the governor to certain of the intending settlers and any they should join with them, specifying the territory granted, with full power to erect a body politic and to nominate officers to be appointed by the governor for the execution of the government among them according to the laws of Holland, except as modified by the governor and council, or restricted in the letters patent. Such a body was a corporation. (See *North Hemstead v. Hemstead*, 2 Wendell, N. Y. Rep. 109.) By the other method the governor and council first granted permission to some of the intending settlers to found a town upon purchasing from the Indians the territory they wished to acquire, for the benefit of all the settlers, the title to vest in the West India Company, which would satisfy the purchase money by rebate of the first rents and taxes, the Indian

in the revenue, the Dutch governors heard the advice of the people through their representatives. Under the Dutch, the people, however, never had any voice in making the laws. Governor Stuyvesant was inclined to persecute the Lutherans, Baptists, and Quakers who came into the colony. But the Amsterdam Board of Directors foresaw commercial disadvantage, and possibly English interference, in such a policy, and thus rebuked the governor : " Let every one remain free as long as he is modest, moderate, his political conduct irreproachable, and as long as he does not offend others or oppose the government."

The Dutch title was precarious ; it never was really defended by Holland, and the colony was surrendered in 1664, upon the first formidable demand made by England. The inhabitants refused to assist the governor in defending it. They expected the English conquest to result in giving the colony liberties similar to those enjoyed in New England.

Charles II. granted the territory of New York, including New Jersey, to the Duke of York, afterwards James II. The governors were appointed by James, and after his accession to the crown, by the king. Difficulties arose between the people and the governors respecting the imposition of taxes. In 1683 the Duke of York, granting a petition of the principal magis-

title being extinguished. The governor and council granted the land to the settlers, reserving rent and sovereignty, and conferring upon the inhabitants "the like privileges, benefits and freedoms as other subjects of New Netherlands are or shall be granted, and the nomination of their own magistrates in form and manner as other villages in this province do enjoy." (Governor Stuyvesant to Arendt Van Curler, August 10, 1664, relative to the founding of Schenectady.) The town being founded, the laws of Holland as modified or added to by the governor and council attached.

The towns last mentioned were the larger in number, and were confirmed in their rights under the English. (Chaps. 2 & 3, Laws of the Colony of New York, 1691, vol. i.; Colonial Laws, pp. 224, 225, ed. 1896.)

Under the state laws such towns were not regarded as corporations except to the limited extent necessary for the management of their common property, but as mere political divisions of the state, and under its government through its officers chosen by the electors of the state resident in them. (*Lorillard v. Town of Monroe*, 11 N. Y. Rep. 392.) Later legislation enlarges their corporate powers. (See "Town Law" of New York, chap. 20, General Laws.) Thus the towns of New York modeled upon the Dutch system, and the towns of other middle and western states modeled upon the New York system, were less in the nature of independent republics than the New England towns, which resembled the chartered boroughs of England.

trates of the colony, directed Governor Dongan to convene a general assembly. This body met in New York, October 17, 1683. Its first act evinces its spirit. It was entitled, "Charter of Liberties and Privileges Granted by His Royal Highness to the Inhabitants of New York and its Dependencies." This charter declared that "supreme legislative power shall forever be and reside in the Governor, Council, and People met in General Assembly," and contained an explicit bill of rights. But James II. vetoed the charter, and in 1686 abolished the assembly and vested its powers in the governor. Upon the accession of William and Mary in 1688, the general assembly was revived. The powers of the governor were specified in his commission.¹

Theoretically the governor was a viceroy, but as money was necessary for the efficient execution of most of his powers, and none could be raised without the consent of the assembly, the assembly was master of the situation. The assembly upon the one side and the royal governor on the other waged ever-recurring contests between popular and royal authority, the main subject of contention being which power should control the public treasury, the governor insisting upon permanent appropriations, and the assembly consenting only to annual and special appropriations, as the surest means of governing the

¹ The commission of George II. to Sir Danvers Osborn, "Captain General and Governor in chief in and over our province of New York," may be taken as a sample of other commissions. It conferred upon him the following powers:—

To govern the province according to the laws and statutes in force or to be enacted.

To fill vacancies in his council (of seven members) in the absence of royal appointment. To suspend the exercise of the functions of the lieutenant-governor or any member of the council until the royal pleasure be known, and to appoint another in his place.

By and with the advice of the council —

To summon the general assembly according to the usage of the province, the members thereof to be elected by the major part of the freeholders of their respective counties, and with the consent of the council to make laws, statutes, and ordinances, not repugnant, but as near as may be to those of the kingdom of Great Britain, giving to the governor the power to veto the same, and reserving the power to the crown to disallow any that should be passed, which should, when such disallowance was duly signified, cease to be laws, if not theretofore approved by the crown.

To establish courts and himself alone to appoint the judges thereof, and other officers of the province; to grant pardons; to raise an army and navy and com-

governor. As was inevitable, these struggles prepared the people for the larger contest of the Revolution.¹

The first settlers of New Jersey migrated from New York. The territory was included in the grant to the Duke of York. He sold New Jersey to Lord Berkeley and Sir George Carteret. They were thrifty gentlemen, and wanted the rents that would accrue from prosperous plantations. They promised liberty with the other inducements they held out to intending settlers. The substance of these inducements was that the colonists should be exempted from English jurisdiction and be given full power to govern themselves. This liberal policy attracted a large number of colonists, and was in the main adhered to. Lord Berkeley, finding that it was easier to obtain tenants than to collect rents, in 1674 sold his share of the province to the Quakers, and New Jersey was thereupon divided into separate provinces, one East New Jersey and the other West New Jersey, the western province falling to the Quakers. Under the influence of William Penn, large numbers of Quakers now migrated to West New Jersey. In 1682 Lord Carteret's executors offered East New Jersey for sale at public auction, and the Quakers purchased it. The Presbyterians of Scotland were at that time under the ban of persecution, and large numbers of them sought an asylum in East New Jersey. There is room enough there, they said, for a man to prosper without wronging his neighbor. Many Puritans from New England also came. When the Duke of York became James II. he determined to deprive both provinces of their charters. East Jersey surrendered hers, and while that of West Jersey was in suspense, the revolution of 1688 arrested further proceedings. The colonies were

maind them ; to suppress piracies, rebellion, and insurrection, to declare martial law in case of invasion, and at other times according to law, to collate persons to vacancies in churches and chapels. With the consent of his council to establish forts and other defenses ; to issue warrants for the payment for the support of the government and not otherwise, of all public moneys raised by any act of the province ; to grant or lease the public lands ; to appoint markets and forts ; and to do various other incidental acts.

¹ In 1697 the governor exclaimed to the legislature, "There are none of you but are big with the privileges of Englishmen and Magna Charta!" In 1737 the assembly thus addressed Lieutenant and Acting Governor Clarke : " You are not to expect that we either will raise sums unfit to be raised, or put what we shall raise into the power of a governor to misapply, if we can prevent it."

united in 1702 under a royal governor and council with a popular assembly. A strong spirit of liberty always prevailed among the people. Their subsequent colonial history presents the details of a thriving, respectable people, jealous of their rights and taking care of them.

The Dutch undertook to plant a small colony in Delaware in 1632, but it soon perished. The Swedes and Finns came six years later and made a permanent establishment. A few Puritans from New England also settled there. But the Dutch compelled the Swedes to acknowledge their jurisdiction, and then they migrated thither in considerable numbers. The colonists were frugal and industrious, but the Dutch government was harsh, and many of them escaped to more liberal jurisdictions. Upon the fall of New York to the English, the Duke of York claimed the province and ceded his claim to William Penn. Penn finally obtained it, and it was governed by a council and assembly of its own, under governors appointed by Penn and his heirs. Usually the governor of Pennsylvania was also governor of Delaware. When the Revolution came on, Delaware claimed recognition as a separate colony, and her claim was allowed.

Georgia is the only colony whose settlement was materially assisted by the English government. Its prosperity was retarded by an excess of well-intended misregulation. England desired to secure this territory from the grasp of Spain. The flourishing colony of South Carolina desired to protect its southern frontier from the invasion of the Spaniards and Indians. James Oglethorpe, a soldier and statesman, benevolent and wealthy, desired to ameliorate the condition of those miserable debtors who, under the rigorous cruelty of English law, were wasting their lives in vice and despair in the English jails. In 1732 he engaged twenty gentlemen to associate with him, and induced George II. to grant them a charter vesting in them the right to settle and to govern for twenty-one years the territory between the Altamaha and the Savannah rivers. The trustees were liberal in their contributions; numerous donations were received from others, and Parliament voted aids to the amount of thirty-six thousand pounds sterling. In 1733 Oglethorpe

accompanied his first installment of released debtors to Georgia and established them at Savannah. The Spaniards had founded St. Augustine in Florida one hundred and sixty-eight years before ; Virginia had begun its settlement of Jamestown one hundred and twenty-six years before. The fame of the benevolence of the founders, of the purity of their motives, of the liberal contributions of the government,—again and again repeated,—and of the favoring climate and soil attracted to this latest of the original thirteen colonies large accessions of Moravians from Germany, Presbyterians from Scotland and Ireland, in addition to further installments from the debtors' jails. Among others came John and Charles Wesley, and soon after George Whitefield, intent upon carrying the blessings of the gospel to the Indians, as well as to their white brethren. But their success did not answer their expectations, and their stay was short.

The colony successfully cultivated the friendship of the Indians, and managed to survive unfortunate contests with the Spaniards, but its growth and prosperity were languid ; not from lack of care and money or the unselfish devotion of its founders, but because their system of government was not such as the people wanted. Slavery was prohibited ; intoxicating liquors were excluded. The grants of land were limited to twenty-five acres to each planter, who must enter military service at the call of the government ; females were not permitted to inherit ; trade with the West Indies was prohibited. Over the boundary, in South Carolina, slaves relieved the white man from the hardship of toil, liquors were not excluded, the law opposed no limit to one's possessions ; the West Indies afforded a market for lumber, military service was not the price of the tenure of land, and the father who had daughters only was gratified with the expectation that they, and not strangers in blood, would succeed to his plantation. Discontent depopulated Georgia of those whose enterprise was most needed, and left the colony incumbered with the dregs of the jails and the poor in spirit. In 1751 the evils of the system were apparent to the trustees themselves ; they surrendered their charter, and a provincial system of government like that in South Carolina was

established, and thenceforth Georgia was permitted to develop along the same lines that had proved successful in the other colonies.

This rapid sketch of the early colonies tends, I think, to show that prosperity and poverty, liberty and oppression, religious persecution and freedom, good government and bad, success and failure, were all steps in the establishment of American institutions and liberties.

CHAPTER III.

COLONIAL CONDITIONS FROM 1700 TO 1775.—EVENTS LEADING TO THE REVOLUTION.—IGNORANCE OF ENGLAND RESPECTING THE CHARACTER OF THE COLONISTS.—THE COLONIAL POSITION.—INDEPENDENCE ACCOMPLISHED.

PRACTICALLY the foundations of self-government were securely laid before the Dutch surrendered New York, New Jersey, and Delaware to the English, before John Locke elaborated his impracticable fundamental constitutions for the Carolinas, before William Penn became a Quaker, and three quarters of a century before James Oglethorpe led his installments of debtors from the prisons of England, to reproach his benevolence under the restraints he imposed upon them in Georgia.

In 1688 the total population of the colonies was about 200,000.¹ In 1775 the population had increased to about 2,500,000, an increase which attests their prosperity.

The revolution of 1688, which placed William and Mary upon the throne, established the rights and power of Parliament and thus of the people, and gave to England a just government secured by law. The colonists shared in this benefit, for as subjects of England they were entitled to a like just government and security. But they asked nothing new; they only asked non-interference. Their systems underwent progressive changes either by amendments to the charters granted by the crown or the proprietors, or by the growth of customs under a liberal practice. In every colony the people either had the liberties they desired or were gradually acquiring them. The royal governors changed often, and each succeeding gov-

¹ Virginia had 50,000; Massachusetts, including Maine, 44,000; New York, 20,000; New Jersey, 10,000; Connecticut, 18,000; Maryland, 25,000; Pennsylvania, including Delaware, 12,000; the two Carolinas, 8000; New Hampshire and Rhode Island, each 6000.

ernor found the encroachments of the popular assemblies more strongly intrenched, and he yielded to precedents which repetition ripened into customary usages.

Liberty, said Franklin, thrives best in the woods. The majority of the people were Protestants, or, as Burke expressed it, "Protestants of Protestants," with the sense of manly equality and independence which radical Protestantism, encouraged by success, implies. They were poor in one sense,—they had no superfluities; but in another sense they were rich, for to a degree unknown in other countries they owned their holdings of land. No other possession so elevates the independent spirit of man. At the north manual labor became honorable. At the south slave labor was largely employed, but the ownership of ample lands and slaves added largely to the owner's sense of dignity and independence.¹

Trial by jury generally prevailed, and among a free people juries by their verdicts often temper and sometimes overrule the rigor of the written law, thus doing for the sake of justice what cost the Stuarts a kingdom when done for the sake of power,—granting a dispensation from the written law. The charters and the acts of Parliament declared that the laws of the colonies should not be repugnant to the laws of England; and thus implied that they must conform to them. The common law was the customary law of England as habitually expounded by her courts, and the colonists by changing their homes did not lose the common law. The common law is the embodiment of common sense, and readily adapts itself to new conditions, and these two features make it a valuable heritage.

In the New England colonies education received early and marked attention. Harvard College was founded in 1636, Yale College in 1700. In Massachusetts, in 1647, every township of fifty householders was required to establish a school where reading and writing should be taught, and in townships of one hundred householders a grammar school was required.

¹ Mr. Burke said in the English Parliament: "They have a vast number of slaves. Where this is the case in any part of the world, those who are free are by far the most proud and jealous of their freedom. These people of the southern colonies are much more strongly, and with a higher and more stubborn spirit, attached to liberty, than those to the northward."

In Connecticut, in 1673, it was enacted that every township which numbered fifty householders should forthwith appoint one within the town "to teach all such children as should resort to him to read and write; whose wages shall be paid by the parents or masters of such children, or by the inhabitants in general." A printing-press was established in Cambridge in 1639.

In Virginia, however, education was at first neglected. In 1671 Sir William Berkeley, who was long a governor of the colony, in a report to the Lords Commissioners respecting religious and other instruction, wrote these words: "I thank God there are no free schools nor printing, and I hope we shall have none these hundred years; for learning has brought disobedience and heresy and sects into the world, and printing has divulged them, and libels against the best government. God keep us from them both." But Sir William passed away, and schools and printing came. William and Mary's College was founded in 1691. The events which led to the Revolution stimulated the study of the law. Edmund Burke said in a speech in Parliament: "In no other country perhaps in the world is the law so general a study. The profession itself is numerous and powerful. . . . The greater number of deputies sent to Congress are lawyers. I have been told," he said, "by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books exported to the colonies as those of the law."

The second century of colonial life witnessed a relaxation of the rigor, scope, and inquisitional character of the early colonial statutes. Every freeman was represented in the assemblies; his care was that the laws should be simple and convenient, and not burdensome to honest men.

Outside of New England laws were few, mere provisions for local needs for the public defense and support of the officers of the government.

For a long time the colonies were under the nominal charge of the English Board of Trade and Plantations. But beyond recommending decayed ex-members of Parliament and mendicant scions of the nobility for appointment as governors, this board gave the colonies little attention. These governors often

went into what was deemed colonial exile in order to gather plunder. They were usually disappointed, for the local assemblies held the control of the purse, and measured the salary of the governor by their measure of his quality, and his facility in bending to their will. If he was troublesome, he was put upon short allowance. The governors were constantly clamoring for more power and pay, and constantly threatening the royal displeasure. The assemblies often treated them with undisguised insolence.¹

In New York, New Jersey, and Massachusetts, if the governors were not complaisant, they were either subdued or set at defiance. Virginia was comparatively rich, and made more liberal provision for them. The proprietary colonies of Pennsylvania, Maryland, and Delaware troubled the proprietors instead of the crown, but very much in the same spirit. The dishonored and pauperized governors wearied the Board of Trade and Plantations with their complaints of the insubordination and republican sentiments of the colonists, but their despatches were not heeded, and probably were seldom read.

In the proprietary and royal colonies, sometimes most excellent results were obtained by professions of loyalty and flattering honors paid to the governor. The more the provincial courtiers exalted the shadow and semblance of his power and state, the higher they elevated their own social position, and the better kept the official administration in harmony with their purposes. Maryland, South Carolina, and Virginia excelled the other colonies in these arts.

In every colony in which the crown or the proprietary appointed the governor, the people, if they had any grievance to be redressed, insisted through their assemblies that the grievances should be redressed before the supplies were voted. This

¹ In 1749 the Assembly of New York caused to be entered upon its journals the following response to the application for a fixed and liberal settlement of a salary upon the governor, and the grant to him of the collection and disposition of the public moneys. "The governors are strangers to the people they are sent to govern; they do not regard the welfare of the people otherwise than to make it subservient to their own interest; they know their tenure of office is uncertain and they make haste to raise estates for themselves. Should the public moneys be left to their disposition, what can be expected but the grossest misapplication?" See note, page 34.

was the practice of the British Parliament. That no money could be extorted from the people by royal power, but could be raised only by the consent of the people themselves, to be given by their representatives, was a part of the colonial gospel. To control the public purse is to control the government.

As the colonies grew in wealth and population, the idea of taxing them began to engage the attention of English statesmen. As early as 1697 a pamphlet was published in England advising Parliament to impose a tax upon the colonies. This was met by two answering pamphlets, in which the right was denied because the colonies were not represented. The proposition was dropped.¹ The trade regulations prescribed by the Navigation Acts imposed duties upon American imports and exports, and forbade the colonies to trade except with England and each other. The English policy toward the American colonies, after their prosperity was no longer doubtful, was strictly commercial. So far as American products were beneficial to England, they were fostered. So far as American products, commerce, or manufactures competed with those of England, they were repressed. She reserved to herself all the benefits of the American trade. Thus American tobacco, tar, pitch, hemp, masts, yards, codfish, and pig iron were favored. But every American manufactured product was by law excluded from England. Hats made in one colony were prohibited from sale in another. The manufacture of iron and steel machines and implements was prohibited. The restrictive acts caused great discontent, and were constantly evaded. The evasion was winked at by the home government, and in most instances the acts fell into disuse. English trade was benefited by the colonial trade, and beyond that, little thought was given to the colonies. This was especially so from 1700 to 1750.²

¹ Charles II. in 1676, under the privy seal, declared that "taxes ought not to be laid on the inhabitants and proprietors of the colony [Virginia], but by the common consent of the General Assembly." (Cooke's Virginia, p. 383.)

² Horace Walpole, in his *Memoirs of George II.*, vol. i. p. 396, speaking of the ignorance of the English court of American affairs while the Duke of Newcastle was Secretary of State, during Sir Robert Walpole's administration, says, "It would not be credited what reams of paper, representations, memorials, and petitions from that quarter of the world lay unopened in his office. . . . He knew as little of the geography of his province as of the state of it. When General Ligonier

The colonies were repeatedly engaged in desperate wars with the Indians, in which England left them to take care of themselves. They were embroiled in the wars between England and France. The French in Canada were their enemies, opposed to them in religion, their competitors for the Indian trade, and for continental dominion.¹

In 1739 Robert Walpole, then Prime Minister, was asked to impose a stamp tax upon the colonies. He declined, saying, "I will leave that to some of my successors who have more courage than I have, and are less friends to commerce than I am. Let the colonists trade; the more they make, the more they buy of us; our industry and produce will be increased, and our exchequer will gain more by indirect than by direct taxation." In 1748 a bill was introduced to abolish all American charters and to give to the king's instructions the effect of laws over the colonies, but after protracted debate, it was withdrawn as contrary to the British constitution. George II. was believed to be friendly to the colonies, and was reported as saying: "I do not understand the colonies. I wish them prosperity; they appear to be happy at present, and I will not consent to any innovation, the consequences of which I cannot foresee."²

In 1748 the English Prime Minister, Pelham, asked the colonial governments to submit to him their views upon Parliamentary taxation of the colonies. The answers presented such vigorous protests against it that the subject was again laid aside. The next year the Board of Trade renewed its consideration, and the law officers of the crown gave their opinion that Parliament possessed the power to tax the colonies. But the Board could do nothing without an act of Parliament, and

hinted some defense to him for Annapolis, he replied with his evasive, lisping hurry, 'Annapolis! Annapolis! Oh, yes, Annapolis must be defended, to be sure Annapolis should be defended. Where is Annapolis?'"

¹ In 1745 the colonies resolved to attack Louisburg, a French fortress of the utmost importance, and after one of the most brilliant attacks in history, they captured it. In the subsequent treaty England inconsiderately restored it to France, to the great mortification of the colonies.

² John Adams's Works, vol. x. p. 347. In 1749 the British cabinet discussed the proposition of creating an ecclesiastical establishment in the colonies on the model of the English Church. The fact that the king was to be head of the church roused such an opposition to the measure in New England that it was dropped.

before this could be obtained war broke out between the Americans and the French and Indians, and was followed by the declaration in 1756 of war between England and France. England, under the lead of the elder Pitt, was determined to help the colonies in what proved to be the final struggle between England and France for the dominion of the American continent. The question of parliamentary taxation was again postponed.¹

The war which followed was fatal to the French dominion. Disastrous at first, the wonderful triumph of Wolfe at Quebec, followed by English successes here and upon the continent of Europe, gave America to the English race, language, ideas, and liberty.²

Thus England delivered the colonies from France, and France in her turn aided in delivering the colonies from England. Although both lost, each power had the satisfaction of humiliating the other, and America reaped the benefits.

The war with the French was expensive to England. With the peace of 1763 the joy of the colonies was great, and their gratitude for the generosity of England was enthusiastically expressed. Had England continued the policy of allowing the colonies to govern themselves, the alienation of feeling which twelve years later culminated in the Revolution would have long been avoided. The colonists were separated from one another, and preferred to be so ; they regarded their separation as

1 In 1759 Pitt wrote to Lieutenant-Governor Fauquier of Virginia that when the war with the French was over, a direct revenue to Great Britain by parliamentary taxation must be drawn from America. The lieutenant-governor answered that such taxation would make trouble, and Pitt did not attempt it. (2 Grahame, Col. Hist. 347.)

2 De Tocqueville, in his celebrated *Democracy in America*, thus laments over the loss of French ascendancy in North America : "There was a time when we might also have created a great French nation in the American wilds, to counterbalance the influence of the English upon the destinies of the new world. France formerly possessed a territory in North America scarcely less extensive than the whole of Europe. The three greatest rivers of that continent then flowed within her dominions. The Indian tribes which dwelt between the mouth of the St. Lawrence and the delta of the Mississippi were unaccustomed to any other tongue than ours ; and all the European settlements scattered over that immense region recalled the traditions of our country. Louisburg, Montmorency, Duquesne, Saint Louis, Vincennes, New Orleans (for such were the names they bore) are words dear to France and familiar to our ears. But a course of circumstances which it would be tedious to enumerate has deprived us of this magnificent inheritance."

favorable to their independence and local self-government, and a security against British interference, since the officers in the home government did not well know one colony from another.¹

Each colony could manage its own affairs, but might be unable to do so if all were confounded together. The average colonist wanted to be let alone. The colonies, other than his own, had religions and methods which he did not like; if he came of the Puritans, they came of the Cavaliers, or, worse, of mere adventurers and vagabonds; his views were narrow, and his prejudices strong; other colonies made restrictive trade regulations; and he sometimes lost through their bad paper money.²

With the conquest of the French in America, the increase of American wealth and prosperity stimulated the avarice of the English commercial classes; they demanded an enforcement of the Navigation Acts, in order to destroy American competition and secure a monopoly of the American trade. The British ministry sent instructions to the collector of the customs at Boston to apply to the judicial authorities for writs of assistance to command the sheriffs and constables to assist in breaking into houses, shops, and ships, to search for goods imported without payment of the duties imposed by the ancient laws. James Otis was employed to resist the application. Otis boldly challenged the power of Parliament to impose the duties. He contended that under the English constitution taxation could not be imposed upon any man without his consent in person or by representation. The speech of Otis became the text of the people's liberties. It created a school of patriots in Massachusetts, among whom were John Adams and John Hancock, over whom Samuel Adams³ became the shepherd and guide. From

¹ "Nothing but common and imminent danger or violent oppression can make them unite." (Gordon, in 1764.)

² Lord Camden in 1762 said to Franklin, "For all that you Americans say of your loyalty, I know you will one day throw off your dependence upon this country and set up for independence." Franklin answered, "No such idea is entertained by the Americans, and no such idea will ever enter their heads unless you grossly abuse them." "Very true," replied Camden, "but that will happen."

³ In Samuel Adams the genius of liberty seemed incarnate. He was a graduate of Harvard, and early devoted himself to a careful consideration of the constitutional and chartered rights of the colonies including the rights of men as men. Despising wealth, and welcoming poverty as the natural condition of freemen, he

1761 to 1775 there was a free and earnest discussion in the colonies respecting their relations to Great Britain.¹

Mr. Burke, speaking in the British Parliament, enumerated six causes of what he characterized as "the fierce spirit of liberty" in the colonies: English descent; liberal forms of government; the religion of the provinces of Massachusetts and Connecticut, which he said was the Protestantism of Protestantism;² the manners in the southern provinces, resulting from slavery; education; distance from England. To these may be added: equality of condition, direct ownership of land, and scarcity of money, which compelled the colonists to investigate the authority for taxation, and to provide against its abuse.

Something, too, may be credited to the influence of the wilderness. In those vast solitudes freedom was everywhere, and tyranny far away. Man might not think of liberty, but he could not help enjoying it. He was unconsciously educated to regard it as a natural condition.

The immediate cause of the Revolution was the attempt of Great Britain to enforce by military power its claim of right to tax the colonies according to the pleasure of Parliament, and the assertion of its right to interfere with and take away any of the rights and privileges secured to the colonies by their charters, and to make laws binding them in all cases whatsoever.

Originally the dispute began between Great Britain and the colonies not upon the right, but upon the mode, of obtaining a small revenue from them. The right was at first conceded, but the mode was disputed. England had incurred a large debt in

meditated profoundly upon the problem of American independence. The masses of the people were nearly as poor as himself. It was for them and through them, as he conceived, that liberty should be achieved and maintained. He taught his countrymen his creed, and inspired them with his zeal.

¹ "The nature and extent of the authority of Parliament over the colonies were everywhere discussed until it was discovered it had none at all." (John Adams to Dr. Morse.)

² It was natural that the Roman Catholics should be persecuted. From the revolt of England from the supremacy of Rome in the middle of the sixteenth century, to the enactment by Parliament at the close of the seventeenth that no Roman Catholic should ever occupy the throne, hatred of the Church of Rome and of its adherents became a test of patriotism and of party fealty amounting to a passion among English Protestants of every sect. It is not yet wholly extinguished.

maintaining war against France, partly for the defense of the American colonies, and the Chancellor of the Exchequer thought they ought to contribute something toward its satisfaction. In 1764 he proposed, and Parliament imposed, certain duties upon various articles of foreign produce imported into the colonies, and upon a few articles exported by them to countries other than Great Britain. It was also resolved that it might be proper to charge certain stamp duties. It was not thought expedient to impose the charge of stamp duties immediately, but to confer with the agent of the colonies and ascertain if any other form of tax would suit them better. The English government supposed it was treating them with condescension, and was greatly astonished at the vehemence with which they exclaimed against the stamp law. This they did without proposing any substitute. The following year the stamp tax was imposed. It was most vehemently resisted, and caused many alarming riots in the colonies. Nine colonies convened a general congress in New York. The congress remonstrated against the tax, and made a declaration of the rights and duties of the people as English subjects. The other colonies concurred. This was the "Stamp Act Congress." The colonists would not use the stamps, and by threats of violence compelled the officers charged with their sale to resign. The English government was amazed and alarmed, and caused an inquiry to be made into colonial affairs.

Benjamin Franklin was the resident agent in London for Pennsylvania, and he was examined as a witness. His testimony reflected the sentiments expressed by the general congress in New York. He represented that the temper of the colonists, until the Stamp Act was passed, was the best in the world; they considered themselves part of the British empire, and were ready and willing to support it to the extent of their power; they had always been ready to tax themselves, and were ready now; they had assemblies of their own; these assemblies were ready and willing to impose such taxes for the benefit of the crown as were suitable to their circumstances and abilities, whenever they were called upon in a constitutional manner; the English Parliament might properly impose the import and

export duties, for such duties were within its rightful power to regulate commerce. England guarded the sea, and these duties were a proper charge for the expense; but the stamp duties were internal taxes which could not be levied upon any English people except by their own representatives, and the colonies had no representation in Parliament, but did have in their own assemblies. Franklin's attention was called to the fact that in the charter of Pennsylvania it was provided that the king would levy no taxes unless with the consent of the Colonial Assembly, or by an act of Parliament;¹ to this he answered that Parliament had never exercised the power, and the people therefore understood that it never would, unless it first admitted their representatives. Colonial representation in Parliament was impracticable, but the colonists would tax themselves if requested. He strongly represented that the people were so poor that they did not have specie money enough to pay for the stamps.

We thus have an idea of the colonial mind in 1765, ten years before Lexington and Bunker Hill. The taxation proposed does not appear to have been great. Greater burdens seem to have existed in the oppressive character of the acts restraining trade, manufactures, and navigation, the validity of which the colonists long admitted. But the colonial disposition was to meet threatened oppression before it became firmly established.

It is a mistake to suppose that our fathers took up arms against actual oppression. It was oppression threatened and feared, rather than executed and felt, which they rose to resist. They met it at the threshold and strangled it there. Notwithstanding the riots and resistance to the stamp tax, the English government was willing to repeal the act, with, however, the obnoxious declaration, salve to its pride, that the Parliament had the right to tax America. In 1766 such an act was passed. The repeal and the declaration went together. When the bill was introduced, party strife ran high in Parliament. Mr. Pitt, afterwards Lord Chatham, was then in the opposition, and seizing upon the position advanced by the colonists that, without repre-

¹ This provision was probably inserted to prohibit the crown from imposing the taxes by royal ordinance or rescript.

sentation, Parliament could not legally impose taxation, he made one of his great speeches in its support.¹ That speech, though it failed to convince Parliament, convinced the colonists. The repeal of the Stamp Act confirmed their convictions.²

The excitement which the Stamp Act caused, and the universal discussion of the right of Parliament to tax America, led to a retraction by the colonists of the concession of the right to impose import and export duties. In 1767 Parliament passed an act providing for the imposition of certain duties upon tea, glass, and paper, and one or two other articles imported into the colonies. These duties were in part counterbalanced by a reduction of some other duties previously imposed. A portion of the money thus to be raised was to be spent in America, but a portion was to be paid into his Majesty's exchequer to defray the expenses of defending, protecting, and securing the colonies,—a provision which the colonists feared meant coercion. Although these were import duties, their exaction aroused the indignation of the colonies and provoked their resistance. Resolutions were adopted not to use the articles, and the custom-house officers in Boston were badly beaten.

The issue was thus sharply made whether Great Britain did indeed have the right to tax America. If the right was conceded by the colonists, it implied a concession that was, theoretically, at least, fatal to their liberties, for, as was said, the right to tax a penny implied the right to tax a pound, yet the surrender of the right was the surrender of the control of England. Mr. Burke said in Parliament: "It is the weight of the

¹ In this speech, in which he denied the right of England to tax America, Mr. Pitt said: "At the same time let the sovereign authority of legislative and commercial control, always possessed by this country, be asserted in as strong terms as can be devised; and if it were denied, I would not suffer even a nail for a horse-shoe to be manufactured in America."

² That it was right for the colonies to assist in paying the expenses of the late war was conceded. It was impracticable for them to be represented in Parliament. Besides, the colonies would have been too jealous of their own representatives and of Parliament to trust their interests to such keeping. To have granted them the privilege to provide their proper quotas of taxation through their own assemblies would have been to grant them to some extent the power of the purse over the English government. They could in such case have demanded a redress of alleged grievances before voting any supply. The Chancellor of the Exchequer, by first asking the colonies what method of taxation would be most agreeable to them, seems to have had some idea of their right to be heard.

preamble, not of the duty, that the Americans are unable to bear." The colonists were greatly encouraged by the support given to their claims by advocates in England, even in the ministry itself. But George the Third was king, and he exercised a power in his own government to which the crown at the present day is a stranger. He was inflexible in his demand that his rebellious subjects in America should obey, if they did not respect, the authority of the home government. It is not necessary to follow in detail the successive steps which culminated in open rebellion. All concessions in taxation which reserved the right to impose the taxes were scouted at. The king insisted, and the colonies resisted.¹

¹ England did not understand the character of the colonists, and greatly underestimated their spirit and intelligence. That the wealthy and educated colonists had not degenerated by emigration; that the pauper colonists had improved in mind, body, and estate; that their children had risen higher than themselves; that a century and a half of colonization had developed a race of men equal intellectually, morally, and physically to the higher types of European civilization, were facts which the Englishman who stayed at home could not understand or believe.

Some idea may be obtained of the contempt with which men of influence and education affected to regard the colonists from expressions which are preserved in contemporaneous literature. Dean Swift, who died in 1745, said the English ruled Ireland "as if it had been one of the colonies of outcasts in America." Boswell reports Dr. Johnson as saying, "Sir, they are a race of convicts, and ought to be thankful for anything we allow them short of hanging," and again as exclaiming, "Rascals, robbers, pirates!" Miss Seward, Boswell continues, replied, "Sir, this is an instance that we are most violent against those we have injured." The expression, "The Americans are a degenerate race of Europeans" was a common one in governmental circles. Said Lord Sandwich in the House of Peers in 1768, "Believe me, my Lords, the first sound of a cannon will send the Americans a-running as fast as their feet can carry them."

"Very early," says Burke, in his History of Virginia, "it had been the fashion to suppose that the colonists by emigrating had lost a portion of their dignity, and that at best they should be regarded only as an inferior order of Englishmen." Smith, in his Colonial History of New York, writing in 1756, says, "Formerly the colonies were at home disregarded and despised, nor can any other reasons be assigned for it than that they were unknown." The list of citations might be largely extended.

The American was educated in the school of self-reliance, a school which may have developed his self-conceit, but it nevertheless developed his robust and vigorous qualities. The mendicant and vagabond in England remained such there because he had no encouragement to emerge from his low estate. It was not so in America. Here he had an opportunity to rise, and it may be assumed that such of the lowest grade of colonists as were the victims of adverse circumstances rose in America to the level of their better condition.

The colonists stated the law of the case substantially in this way: We are Englishmen; we have the rights of English subjects. It is the fundamental law of England that no tax can be laid upon the people except by their consent, to be given by their representatives in Parliament. We in America are not represented there; therefore our consent cannot be given there. We are represented here in our own assemblies, and here only can our consent be given, and therefore here only can we be taxed. Hence, what supplies we furnish the king must be our free gift; our gift through our commons to our king. We came here and remained here upon the pledges of liberty secured to us by our charters. These charters secure to us the privileges which every Englishman holds as his birthright, extended and regulated to conform to our needs in a distant colony. To take them away is the breach of compact, the wrongful act of a tyrant. Moreover, England, they finally began to argue, is only one and an equal part of the whole kingdom, and therefore has no right to give the laws to the other parts.

In 1773 Parliament, in imposing a duty upon tea to be imported into the colonies by the East India Company, explicitly declared "that the colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and Parliament of Great Britain;" and that the king, by and with the consent of Parliament, "had, hath, and of right ought to have, full power and authority to make laws and statutes . . . to bind the colonies in all cases whatsoever."

But England had delayed too long this bold assertion of its power "to bind the colonies in all cases whatsoever." By the neglect of the crown the people had grown in strength, and in the knowledge that they possessed it. The colonies did resist the pretensions of Great Britain, and the Revolution came on.

This resistance brought the colonies together. It was on the 5th day of September, 1774, that a number of delegates, chosen and appointed by the separate colonies, met at Carpenter's Hall, in the city of Philadelphia. A mob had thrown overboard in Boston harbor a cargo of tea, upon which the British Parliament had imposed a tax or duty. Other acts of rebellion had hap-

pened, and Parliament determined to discipline Massachusetts. In March, 1774, Parliament passed three bills: the first for closing the harbor of Boston, and suspending its trade during the pleasure of the king; the second, that the king should appoint the provincial council, that the royal governor might appoint and remove judges and sheriffs at his pleasure, and that no town meetings should assemble without the royal governor's license; and the third was that if any person should be indicted for murder in aiding the magistracy, he might be sent to Great Britain for trial.¹ It was plain that if these things could be done, more could be done. If in Massachusetts, then in every other colony. All the colonies were alarmed. They made the cause of Massachusetts their own. Hence the first Congress at Philadelphia. It did not adopt any very decided measures. It brought the colonies together. It provided for meeting again. It familiarized the people with the fact of concerted action, and with the idea that in union there is strength. It was the first of an endless succession of congresses, and thus a great fact in our constitutional history.

There were fifty-five members; they sat with closed doors; they talked over their grievances, but they did not talk of independence or of arms. They talked rather of their rights under the crown, and how under it, and with loyalty to it, they could secure redress of grievances. They drew up an address to the king, and asked him to repeal the obnoxious laws and make no more. They recommended to the people of the colonies that while their grievances were unredressed, they should neither buy from, nor sell to, the people of Great Britain. Great faith they had in the coercive power of withholding trade. Our people had the same faith later,—under every administration from Washington to Madison. It proved to be ill founded.

¹ The third bill was enacted because it was supposed that the royal magistracy, to be created under the second bill, might in their efforts to suppress sedition find it expedient to order that the offenders be shot down. If any should be killed, those who fired upon them might be indicted for murder and be convicted, notwithstanding the fact that the royal sheriffs mentioned in the second bill would have the selection of the persons composing the juries. Hence the governor might send the indicted persons to Great Britain where, by means of "a mock trial"—denounced in the Declaration of Independence—they would be protected from the fate which it was feared would befall them if they should be tried here.

But this Congress recommended that another Congress should meet in May, 1775. It adjourned, and saw that the king did not heed its petition. The public temper became more inflamed. The British government in February, 1775, declared the province of Massachusetts to be in rebellion. No doubt it was. British troops were sent to Boston. They were unkindly received. The Massachusetts men began to arm themselves, and prepare to be ready upon a minute's notice.

It was on the morning of the 19th of April, 1775, that British troops fired upon some of these minute men at Lexington. They killed seven, and wounded nine. On the afternoon of the same day they met some volunteers and militia at Concord, and there followed a straggling fight all along the road from Concord to Boston. The British regulars got the worst of it. These were the battles of Lexington and Concord ; small affairs when compared with the great contests in which our arms have since been engaged, but in their momentous consequences very great. It is the first step that costs, and on that April day our fathers dared to take it, with all its eventful consequences.¹

The second Continental Congress met at Philadelphia, May 10, 1775. The country had resolved to fight: for what? For an independent government? No ; only for a redress of grievances, and to resist and to expel the armed forces that had been sent over to coerce them into obedience to the royal authority. They hoped that a sharp and stubborn resistance would bring King George to reason. They hoped more from the division of parties in England than from any expectation of convincing the king and his government. Parties were divided there, and it was not without some reason that our fathers hoped that their resistance here would so strengthen the hands of the opposition as to force their enemies out, and put their friends in power. They were angry, and they drifted on into war without daring to think just how the end would come about. They did not speak of independence at the start ; the courage to do that came

¹ Samuel Adams was under the ban of the British government, and was hiding near Concord from arrest by its officers. His exclamation when he heard the roar of musketry was, "What a glorious morning is this." His prophetic sense took in the consequences.

later, with harder blows, with hopes deferred, with new aggressions, with their bridges burned behind them, and the chance for safe and honorable retreat thrown away. Besides, they soon perceived that if they must fight, it was better to fight for all that could be won in the contest. The desire to find any plan of accommodation faded away. Ideas of independence began to take possession of men's minds. The narrow provincial jealousies, prejudices, and animosities were suppressed, and the broader horizon of a national life broke upon their vision. It was a great change. Hitherto they had compared one colony with another; now they compared their aggregated power and resources with those of the mother country, as she could wield them from over the ocean, and maybe under the guns of her continental neighbors. They took courage from the comparison, and were eager to try their newly found strength. The revolt of Massachusetts became the Revolution of America.

The Continental Congress was no legal government. It had no authority, no troops, no money. It was a mere voluntary association of delegates, sent from the several states for the purpose of consultation as to what it was best to do and advise. It was indebted to the courtesy of the carpenters of Philadelphia for the hall in which it met. Events pushed it on to the assumption of some authority. By common consent Congress became the adviser of the people, the regulator of their angry patriotism. It resolved that the war should be by and on behalf of all the colonies. Massachusetts procured George Washington of Virginia to be appointed commander-in-chief of the American forces. Thus Massachusetts pushed Virginia to the front. Washington had had some experience in the French War,—not much in high command, for the provincial officer was thought fitter to obey a British officer than to take equal rank with him; but the small opportunity Washington had had to command had been well used. Since the death of Sir William Johnson, who was the only American decorated by royal favor for services in the French War, Washington was probably regarded as the greatest among the living soldiers in America. It was good policy to appoint him. It made the war in Massachusetts a general war. Washington was the wealthiest man

in the land, and the most conspicuous citizen of the most important colony. It was a step towards that United States that was even then the dream of multitudes, and a year later the openly announced object of the war.

The sentiment in favor of independence soon found expression. Perhaps questioningly and timidly at first, for the expression was treason to Great Britain. It was a matter of life or death to resolve that the abuse of power absolved the subject from his allegiance to his king. The bold and angry asserted it, but the weak and cautious doubted and feared. Much was written upon the subject. A pamphlet of Thomas Paine, entitled "Common Sense," of which one hundred thousand copies were distributed, was most influential in shaping public opinion.

The battle of Bunker Hill was fought June 17, 1775. The provincial loss was four hundred and fifty men, killed, wounded, and missing, and the British one thousand. A week later, Congress put forth its declaration of war. "Our cause is just," it said, "our union is perfect, our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable. In defense of the freedom that is our birthright, we have taken up arms. We shall lay them down when hostilities shall cease on the part of our aggressors. We have not raised armies with the ambitious design of separating from Great Britain, and establishing independent states."

The war was long and weary, and must often have seemed to be wholly hopeless. The fortitude, common sense, and skill of Washington sustained an exhausted people amidst the most disheartening disasters. Though battles were lost, the cause steadily gained. More was won by avoiding and exhausting the enemy than by encountering him. Victory finally rewarded the patient waiting for it. France came to our relief. England was crippled at home, and at last yielded to the inevitable.

CHAPTER IV.

THE STATE CONSTITUTIONS.

THE question of independence had to be met. By the war the royal governments were practically suspended in the several colonies. Popular government must be had, since no other existed. As early as November, 1775, New Hampshire asked the advice of Congress. The royal governor had fled the colony. Congress, after much hesitation, advised New Hampshire to call a "full and free representation of the people," and if on consultation it should seem necessary, then "to establish such form of government as in their judgment will best produce the happiness of the people, and most effectually secure peace and good order in the province, during the maintenance of the present dispute between Great Britain and the colonies." New Hampshire followed the advice, and on January 5, 1776, adopted the first state constitution formed by the people. It was not at all defiant. On the contrary, the constitution recited the predicament which the "state" — not the "colony" — had fallen into, the advice of Congress, and then used these words: "Reduced to the necessity of providing some form of government to continue during the present unhappy and unnatural contest with Great Britain, protesting and declaring that we never sought to throw off our dependence upon Great Britain, but felt ourselves happy under her protection while we could enjoy our constitutional rights and privileges; and that we shall rejoice if such a reconciliation between us and our parent state can be effected as shall be approved by the Continental Congress, in whose prudence and wisdom we confide, we accordingly resolve," etc. It provided an executive department, made the council elective by the people, and converted it into an upper legislative chamber. The legislature afterwards provided for the judicial department.

Congress gave similar advice to South Carolina and Virginia. The states of New Hampshire, South Carolina, Virginia, and New Jersey adopted state constitutions before the Declaration of Independence was declared. These colonies had provincial governments, under governors appointed by the king. The governors were the first to flee. Pennsylvania took alarm at this dangerous assumption of power by "the people." It enjoined its delegates in the Continental Congress "to dissent from and utterly reject any proposition, should such be made, that may cause or lead to a separation from our mother country, or a change of the form of this government."¹

These states committed their governments to executive, legislative, and judicial departments.

By the 4th of July, 1776, Congress had so far advanced as to be ripe for the Declaration of Independence. By that declaration and its ratification by the several colonies the royal government passed away. That fact is not debatable; but what sort of national government took its place has been much debated since. The declaration recites that "these *united* colonies are, and of right ought to be, free and independent states." It does not say that the separate colonies are free and independent states, and hence the argument against state sovereignty and state independence, *union* of the colonies being the condition of independence, and "one people" the result. Nor does it say that these united colonies are a free and independent *state*, and hence the argument that the colonies were not consolidated into one state, and therefore that they obtained freedom and independence in their separate condition; that all together guaranteed to every one separately that that one should be independent, and hence every one became independent, and no consolidated state was formed out of all. Practically, each state was free and sovereign because it had no superior.²

¹ Governor Franklin of New Jersey, the loyalist son of the patriotic Benjamin, complained, in his message, of essays in the newspapers favorable to the "horrid measure" of independence. He never became reconciled, was arrested and banished from the state, and betook himself to England.

² "I consider this a declaration, not that the united colonies, jointly, in a collective capacity, were independent states, etc., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by

The thought in the mind of the framers no doubt was that every colony was free and independent of the king. There was no need to say independent of each other ; they had always been so, and the idea of erecting a common central government out of all, and over all, was not yet suggested.

Connecticut and Rhode Island found that their royal charters were as good constitutions as they desired, and all they needed to do to change their government and their allegiance was to pull down the royal and hoist the people's flag.¹

It was on the 9th day of July, 1776, that the Declaration of Independence was read and ratified by the " Provincial Congress of the colony of New York." This was not the assembly of the colony, but a sort of rebel congress convened at the request of an executive council appointed by the people. This council was assembled "to deliberate upon, and from time to time to direct, such measures as may be expedient for our common safety ;" it was in fact the government of the people in displacement of the royal government. On the 10th of July this Congress changed its title to the " Convention of the representatives of the State of New York." The people in New York were divided into parties. There were parties of peace, of action, and of union, but the parties of action and union became one, with large accessions from the party of peace. This state convention, it is interesting to notice, was a movable body. It sat at White Plains, then at Harlem, at Fishkill,² and finally at Kingston, where on the 20th day of April, 1777, its own authority and its own laws, without any control from any other power on earth." (Justice Chase, in *Ware v. Hylton*, 3 Dallas, 224.) Justice Chase was one of the signers of the declaration.

¹ Constitution of Connecticut, adopted 1776. " Be it enacted and declared by the Governor, and Council, and House of Representatives, in general court assembled, that the ancient form of civil government contained in the charter from Charles II., king of England, and adopted by the people of this state, shall be and remain the civil constitution of this state, under the sole authority of the people thereof, independent of any king or prince whatever."

It was often in vain objected that this was nothing but a statute.

² We find a curious record of the convention at Fishkill. It met in the Episcopal church, which, says the record, " being foul with the dung of doves and fowls, without any benches, seats, or conveniences of any kind, the convention adjourned to the Dutch church." The palatial apartments of the representatives of the people in the capital at Albany contrast strikingly with this hencoop at Fishkill, and the contrast illustrates the growth of the state.

the first Constitution of the State of New York was adopted. John Jay, afterwards Chief Justice of the United States, was the principal draftsman of the instrument. It provided for the election of the governor by the people.

The states of Pennsylvania, Delaware, Maryland, and North Carolina adopted their constitutions in 1776, Georgia in 1777, and Massachusetts in 1780. These constitutions were very much alike. They were copied largely from their colonial charters, except that election, direct or indirect, by the people was substituted for appointment by the king or his governor. The executive, legislative, and judicial departments were continued. There was usually a full bill of rights, founded in great part upon Magna Charta, and the Bill of Rights of English subjects as declared upon the accession of William and Mary in 1688, with additions suggested by the Declaration of Independence. The colonists had in vain contended that an act of Parliament against Magna Charta was void, and they therefore were explicit in defining the rights of the people which their own governments must not invade. All the states except Pennsylvania and Georgia replaced the old council by a senate or upper legislative chamber. Judges were appointed for life or during good behavior. An elective judiciary is a modern innovation. The qualification of electors varied in the different states. In New Jersey "all inhabitants" resident for twelve months in the county in which they claimed to vote, of full age, who were worth forty pounds, were qualified. This included women.¹ In the other states suffrage was limited to male citizens, twenty-one years of age, having a specified amount of property, or being tax-payers, or freemen according to the definition of that term prescribed by the state law. The Declaration of Independence practically put an end to religious qualifications for suffrage, although not in all the states to such qualifications for office.²

¹ *Minor v. Happersett*, 21 Wallace, 162. This case contains a summary of the qualifications of voters in the several states at the time of the adoption of the constitution.

² "In Virginia and North Carolina they have made an effort for the destruction of bigotry which is very remarkable. They have abolished their establishments of Episcopacy so far as to give complete liberty of conscience to dissenters, an

The new constitutions were written instruments. A written frame of government was familiar to the colonial mind. The colonies which did not have charters had by the laws enacted by their provincial assemblies clearly defined their systems. What was customary was regarded as interwoven into their constitutions.¹ The rights and privileges they had contended for in their contests with the royal governors and had not wholly secured, they now regarded as won. It was not difficult for the learned lawyers of that day to modify the old system and adapt it to new conditions and privileges, and to the sovereignty of the people, and to introduce such new features as seemed to them needful or suitable to their larger liberties.²

To continue the executive, legislative, and judicial departments in some form was a matter of course. These departments, if properly empowered and kept separate from each other, are ample for the exercise of all governmental power, since, unless restricted by the fundamental law, the legislative department can make all needful provisions. These departments are essential in all governments, whether popular, royal, or mixed. The graver problem which confronted the people was how to make these departments the best possible. This problem is still an open one.

In the constitutions of Virginia, North Carolina, Maryland, and Georgia, adopted in 1776, it was declared that the executive, legislative, and judicial departments should be kept separate and distinct, and most of the constitutions forbade the holding of two inconsistent offices by one person. The separation of these departments, their independence of each other, and clear definitions of their respective powers and limitations,

acquisition in favor of the rights of mankind which is worth all the blood and treasure which has been or will be spent in this war." (John Adams to Joseph Warren, February 3, 1777.)

¹ "Therefore that this colony may contribute consistent with their custom of providing for their defense by their militia . . . which custom being in a manner interwoven into their constitution." (Extract from Act of 1762, Colonial Laws of New York, vol. iv. p. 611, ed. 1896.)

² "In Virginia the people seem to have laid aside the monarchical and taken up the republican government with as much ease as would have attended the throwing off an old and putting on a new suit of clothes." (Jefferson to Franklin, August 13, 1777.)

are most efficient safeguards of good government. The need of this separation had been suggested by the experience of some of the colonies; sometimes the governors had sought to control both legislature and judiciary, and sometimes the legislatures had sought to control the governors and judges by withholding their salaries.

Under the colonial system, the governor, a council, and the representatives of the people constituted the law-making body. In some of the colonies the council sat apart from the representatives, thus forming a sort of senate; in other colonies all sat together. The legislature under the new constitutions in a majority of the states consisted of two chambers. The colonial governors and councils, where not appointed by the crown or proprietor, had been chosen by the chartered company, of which the freemen were members.¹

The State of New York did not finish her Constitution until 1777. We have seen that she made the governor elective by the people, and this method, already existing in Rhode Island and Connecticut, was soon afterwards adopted by Massachusetts and New Hampshire, and later by most of the states. The attribution of powers to these departments was also made in the light of colonial experience.

It is obvious, upon comparing the original constitutions of the early states with those now existing, that the early framers had clear conceptions, possibly clearer than the later framers have had, of the distinction between the fundamental law which it is proper to place in constitutional form, and the statute law which may at any time be repealed or amended. A constitution, properly so called, enumerates or assumes the powers which sovereignty may exercise, and designates or provides for designating the agencies by which such powers shall be wielded. It may fix limits to such powers and guard against their abuse

¹ By the charter of Massachusetts (prior to 1684), and the charters of Rhode Island and Connecticut, and the custom in Plymouth, the power of electing the governor and officers of the colony was vested in the chartered company. The company consisted of its officers and the freemen; the freemen consisted of such persons as the company should admit; as the company admitted nearly every one who was a freeholder and of good character, and in Massachusetts and Connecticut, of approved religious belief, the power of election practically passed to the people.

or confusion. Such powers being defined and limited, the details of their administration, depending largely upon circumstances, may be left to legislation.

The original states have frequently amended their constitutions, and with the addition of new states with their constitutions and amendments, the science of making state constitutions has had a wide field for development. The most notable changes are the extension of the right of suffrage and the distribution and decentralization of the executive power of the states. Now we have a governor, and we call him the chief executive. But we assign to other officers, most of them elective, the great mass of the executive and ministerial duties of the state. The governor has a small range of patronage,—the pardoning power, and a qualified veto power upon legislation, and in some cases the power of removal of officers whom he may find guilty of official misconduct. If he is of much force in the government of the state, it is because of his strong character. He is a passenger on board the ship, which is navigated by a crew which he does not select, and over which he has few powers of command.

The state judiciary is now generally elective. The judiciary commands public confidence, because now, as in all ages, an intelligent people will not abide an unjust judge. Additional restraints have been imposed upon the legislative power, and this largely for two reasons, first, because the people are impatient of laws that restrict their liberties; and second, lest the craft of the commercial spirit prostitute the public good to private gain. The tendency of legislation, however, has been — and this tendency has often taken constitutional form — to promote charities, to abolish imprisonment for debt, to enlarge the list of the householder's property which shall be exempt from execution for debt, to provide better treatment for criminals, to place the wife's property rights upon an equality with the husband's, to shorten the hours of labor, to regulate factory labor, especially that of women and children, to protect the public health, to suppress lotteries and gambling, to regulate corporate monopolies, to provide free common schools, and to foster local public improvements. These and a few other mea-

sures are the survivals of many experimental efforts to protect the people against their misfortunes, to interpose the humanity of the whole against the inhumanity of a part, and to make the state or the local municipality furnish such institutions and conveniences as are a benefit to all, and to bear or to lighten the burdens of those who if unaided must sink beneath them. The list cannot be much extended with safety. In our earlier history individualism was foremost in its demands and successes. As the population grows denser, the weaker individuals are often pushed to the wall, and they cry out to the state for help. The state is ready to help those who are worthy and through misfortune cannot help themselves. But the unworthy may get a large portion of what none but the worthy should receive, and when this is permitted the unworthy rapidly increase, and if fostered, the state degenerates.

CHAPTER V.

NECESSITY FOR A NATIONAL GOVERNMENT. — THE ARTICLES OF CONFEDERATION. — FAILURE OF THE SYSTEM. — EVENTS LEADING TO THE CONSTITUTIONAL CONVENTION. — THE CONVENTION CALLED.

WE have seen that it was comparatively easy for the colonies to change their colonial into state governments.

But there was to be wrought out under the necessity and pressure of the war with the mother country, and the burdens and duties which the war would entail, a common government for the common defense and the general good of all the states. This was the new problem which the American people were destined to solve. The states themselves must be protected against the common enemy, and possibly against each other. This elaboration of the general government, which resulted in 1787 in framing, and in 1788 in adopting, the Constitution of the United States, forms an instructive portion of our constitutional history. It took the twelve years from 1776 to 1788 to bring it about. The first step was the meeting of the Continental Congress. Practically, this accomplished the union of the colonies for the purpose of carrying on the war. The second step was the Declaration of Independence. This affirmed the union of the colonies in their renunciation of allegiance to Great Britain. The third step was the effort of Congress to provide efficient measures, in which all the states should take part, to prosecute the war, and resulted in the Articles of Confederation. The fourth step was the adoption of the Constitution.

The Articles of Confederation were of themselves the first written Constitution of the United States. Their importance will justify our attention to their history and character.

The necessity of an organized union of the colonies into one common power, adequate to command the resources of the

whole in the conflict with Great Britain, was obvious from the first. But it was not obvious that the creation of one state out of all the people, and commanding them all, of its own right and power, was the best method. It was plain enough, however, to a few. Thomas Paine, in "Common Sense," in January, 1776, said : "Let a continental conference be held to frame a continental charter." Many wise friends of the cause repeated, and from time to time renewed, the suggestion. But a continental charter or constitution for one continental state or nation was to await the teachings of experience and the pressure of calamities. An association or confederation of the states, in which each state should pledge itself to comply with the request of the committee or congress of the whole, was thought to be either a sufficient expedient, or the only practicable one.

In June, 1776, a committee was appointed by the Continental Congress to prepare the form of confederacy to be entered into between the colonies. This was before the Declaration of Independence was adopted. The committee in July did report a plan, and Congress debated, and considered, and waited, until a year from the following November, before it actually agreed upon the plan, in the form of Articles of Confederation, to be submitted to the several states for adoption. The method of adoption proposed was that each state should instruct its delegates in Congress to subscribe the same in behalf of the state. Congress sent out a circular letter to each state. That letter presents the difficulties in the way very clearly. It recites that —

"To form a permanent union, accommodated to the opinions and wishes of the delegates of so many states, differing in habits, produce, commerce, and internal police, was found to be a work which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish. Hardly is it to be expected that any plan, in the variety of provisions essential to our union, should exactly correspond with the maxims and political views of every particular state. Let it be remarked that after the most careful inquiry, and the fullest information, this is proposed as the best which could be adapted to the circumstances of all, and as that alone which affords any

tolerable prospect of general ratification. Permit us then earnestly to recommend these articles to the immediate and dispassionate attention of the legislatures of the respective states. . . . Let them be examined with a liberality becoming brethren and fellow-citizens, surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being forever bound and connected together, by ties the most intimate and indissoluble. And finally let them be adjusted with the temper and magnanimity of wise and patriotic legislators, who, while they are concerned for the prosperity of their own immediate circle, are capable of rising superior to local attachments, when they are incompatible with the safety, happiness, and glory of the general confederacy."

When the Articles of Confederation were submitted for adoption, many objections were stated by the different states, and many amendments proposed. "It is observable," says Mr. Madison in the 38th number of "The Federalist," "that among the numerous objections and amendments suggested by the several states, not one is found which alludes to the great and radical error which on actual trial has discovered itself." That error was, that the confederacy did not itself execute its resolves, but requested the states to execute them. Congress did not accept any of the modifications suggested. The states were intensely jealous of any central power or headship over themselves, and, had not the pressure and danger of the war been upon them, they would not have adopted these articles. All the states, except Delaware and Maryland, ratified them in 1778 ; Delaware in 1779, and Maryland not until March, 1781. One of the causes of delay was a controversy between the states in regard to the public lands, which upon the separation from the crown had passed to the several states. The states which had the least land, or whose boundary claims were doubtful, felt that the whole ought to be surrendered to the United States to provide a fund to pay the expense of the war, and also to provide a domain for the creation of new states. The claim was finally allowed and the concession made.

Five of the seven years of the war had passed before this Constitution was adopted. What authority had Congress in the

mean time? None whatever, except what was implied from the consent of the states or of the people. The Congress was in fact the only central government that existed, and its powers to bind the whole rested upon the unwritten constitution, which rested upon the implied consent of the people. Success ratified the assumption of power. The Supreme Court afterwards held that this Congress had sovereign and supreme powers for national purposes, and that its powers were to be ascertained from its acts.¹

The Articles of Confederation² should be examined with reference to the union which they established, the form of government created, the powers conferred, and the powers omitted.

The parties to these "Articles" were, in name at least, not the people of the states, but the states themselves; the sovereignty of the states united had to be tried before the sovereignty of the people of the United States could be found.

The instrument was styled "Articles of Confederation and perpetual Union between the States," and the whole body was called "The United States of America." Each state retained its sovereignty, freedom, power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. The union was described as "a firm league of friendship" between the states, for their common defense, the security of their liberties, and their mutual and general welfare; each state bound itself to assist every other against all assaults or force, offered on account of religion, sovereignty, or under any pretense. The *free* inhabitants of each state were to have all the privileges of free citizens in the several states; trade and intercourse were to be free, fugitives from justice should be given up, and full faith should be given in each state to the records, acts, and judicial proceedings of every other state.

The powers of government were vested in a general Congress — this was of a single house. This body exercised all the executive, legislative, and judicial powers granted to the United States. Each state chose its own delegates in its own way, and maintained them at its own expense. It might have seven,

¹ *Penhallow v. Doane*, 3 Dallas, 54.

² See Appendix.

but should not have less than two, delegates. Each state had one vote. No delegate could hold any office under the United States. Thus the states did not form one government, but could do so if they should agree.

This government could declare war and establish peace; send and receive ambassadors; make treaties and alliances, but could make no treaty of commerce which should prevent a state from imposing such duties on foreigners as its own people were subjected to, or which should prohibit any exportation or importation. It could deal with captures or prizes made by land or sea; grant letters of marque or reprisal in times of peace, and establish courts to try piracies and felonies committed at sea, and determine appeals in cases of capture.

It could settle disputes between states, and controversies concerning land titles, where two states had granted the same land.

It could coin money and regulate the value of coin, but it never coined anything but copper cents. It could establish weights and measures, regulate Indian affairs, establish post-offices, appoint officers other than regimental in the army, and govern and regulate both army and navy; it could ascertain and appropriate the sums necessary for the public service, build and equip a navy, borrow money and emit bills on the credit of the United States, make requisitions upon each state for its quota of troops; but each state was to enlist its own quota of troops, equip, arm, and clothe them, at the expense of the United States. It took the votes of nine states to do most of these things.

All charges of war or for the general welfare were to be paid out of the United States treasury, but the United States could not raise a dollar by tax, impost, or duty. It could only ask the states to raise this money. The commerce of the country was left to each state, and each state could levy what duty it chose on foreign imports. There was no power in the United States to enforce its requisitions. Congress could make a treaty, but could not compel a state to observe it. It could issue bills of credit, but could not command the money to pay them.

In all governments the power over the purse is the most important.

The confederation, lacking this power, lacked the essential requisite of efficiency. It could only request the states to act. This would have sufficed, if all the states had been always willing and prompt to act as requested. But they were not. Sometimes one state would wait for another, and sometimes a state would dispute the justice or equality of the requisition made upon it, and would not comply with it at all. In time of war the general government always wanted more money than it was easy for the states to pay. Under our present Constitution the United States, instead of asking a state to act, acts directly upon the people itself through its own laws and officers. If it wants to raise money, it imposes the tax, and collects it. It imposes duties upon imported goods, or upon whiskey and tobacco, and collects them itself. The confederation could not do this. If the United States now wants troops, it raises them. The confederation could not do this. Congress was the sole governing body. Now we have the executive, judicial, and legislative departments. The pressure of the war, however, and the feeling among the people that Congress must be sustained, enabled it to carry through the war. The states and the people were willing to take the advice of Congress and obey it, perhaps more readily before the Articles of Confederation than after. Before the Articles Congress was not limited, but under them it was.

When the war was over, and its great burden of debt pressed upon the states, the confederated government practically broke down. It needed the constant coöperation of the states, and when this failed the government was powerless.

Still, the Articles of Confederation had many good features, and these are preserved in our present Constitution.

The Articles were the intermediate step connecting the Declaration of Independence with the Constitution. We disparage them because of their many imperfections. This is unjust. Because it took two steps instead of one to reach success, the first step should not be disparaged. The Articles of Confederation certainly have the merit of being the first elaboration of the details by which the functions of the separate powers of the several states were consolidated into one national power.

The system would have been good if the states had faithfully complied with it.

The Articles of Confederation brought the states into close relations, opened up trade and intercourse with each other, and forbade the passage of hostile trade laws. The citizen of one state was not an alien and stranger when he went into a neighboring state. The general Congress could negotiate peace with Great Britain, free from the vexations which must have existed if every state had been obliged to do it separately. The difficulty would have been great if England had made peace with Massachusetts and Pennsylvania, and not with New York. The war that had been waged against the common enemy might have been changed to a war among the states, with Great Britain as the ally of some and the enemy of others.

The treaty of peace was at last signed on the 3d day of September, 1783, and the independence of the United States was established. The new government had now before it the perils of a peace establishment. The United States government had contracted a debt of about \$42,000,000, which it was in honor bound to pay. The several states had contracted state debts amounting in the aggregate to about \$26,000,000. The country came out of the war very poor, so poor, indeed, that the revolutionary soldier was discharged practically unpaid. He had had nominal pay for only three months, and this was in scrip worth two and sixpence for twenty shillings.

With the accession of peace, the first duty of Congress was to pay its discharged soldiers. The states would not all respond in full. It was necessary to provide for the payment of the public debt, or to apportion it among the states, to make such uniform regulations of commerce as would be just to all the states, and to discriminate among foreign states by extending or denying to them the privileges they extended or denied to us. It was desirable to make provision for selling the public lands, and colonizing them; also to provide a uniform currency throughout all the states, and hence to prohibit any state from issuing paper money. It was important that contracts should be enforced, and hence to prohibit any state from passing laws to impair them. Above all, it was important to keep the

faith pledged in the treaties with foreign nations. Congress could accomplish nothing except by the consent of the states.

In 1780 delegates from four New England states and from New York assembled at Hartford, and recommended to all the states and to Congress to provide, by taxes or duties, an inalienable revenue to discharge the public debt, and to empower Congress to apportion taxes among the states according to the number of inhabitants. But the plan failed. An attempt was made, in 1782, to amend the Articles of Confederation so as to give the power to Congress to levy and collect duties upon imported goods. Had it been adopted, it is probable the confederacy would have been so strengthened that a new constitution would have been long delayed. A judicious scale of import duties, and a proper provision for the sale of the public lands, probably would have kept the confederacy on its feet, if no domestic dissensions had intervened.¹ But the amendment needed the assent of every state, and Rhode Island refused. Newport, the chief commercial city of that state, was then a port of the first importance. Rhode Island thus replied to the request of Congress :—

“First, the proposed duty would be unequal in its operation ; bearing hardest upon the most commercial states, and so would press peculiarly hard upon that state which derives its chief support from commerce.

“Second, the recommendation proposes to introduce into that, and the other states, officers unknown and unaccountable to them, and so is against the constitution of the state.

“Third, that by granting to Congress a power to collect moneys from the commerce of these states, indefinitely as to time and quantity, and for the expenditure of which they would not be accountable to the states, they would become independent of their constituents, and so the proposed impost is repugnant to the liberty of the United States.”

Rhode Island had the power by force of her position to sell her taxed goods to the people of other states, or compel them

¹ John Randolph said in 1824 that if the Congress of the Confederacy had possessed the power to lay a duty of ten per centum *ad valorem* on imports, the Constitution would never have been called into existence.

to pay duties to her if they imported goods through her port. Her objection to a central power appointing revenue officers, to eat out the substance of the people, was a common one in other states. The same objection that they had had to the taxes imposed by King George, they now had to the imposition of them by any other power than their own. It was further objected that to lodge both purse and sword in Congress would be to create a new tyrant.

While Congress had some hope of inducing Rhode Island to abandon her objections, Virginia withdrew her assent to the proposed amendment to the Articles of Confederation. As early as 1779 Virginia had protested that "she was greatly alarmed at the assumption of power lately exercised by Congress." In April, 1783, Congress adopted a resolution recommending to the states to give Congress the power to levy duties upon all imported goods for twenty-five years, for the sole purpose of paying the public debt, to be collected by officers chosen by the states but removable by Congress. The proposed measure failed for want of the unanimous consent of the states. From 1782 to 1786 requisitions of Congress, aggregating more than six millions of dollars, yielded about one million.

The difficulties which Congress experienced in procuring the states to comply with its requests so discouraged it that it became difficult to obtain the necessary attendance of its members. The agent of France, having repaired to Trenton in 1784, in expectation of the assembling of Congress, found no quorum there, and after waiting some days reported, "There is in America no general government, neither Congress, nor president, nor head of any one administrative department."

There is no doubt that the condition of the states from the close of the war in 1783 until after the adoption of the Constitution was much worse than it had been at any time in the colonial period. The policy of Great Britain was, by hostile regulations of navigation and commerce, to teach our people the difference between their condition while dependent upon her and their condition when exposed to her resentment. With the return of peace the American merchants, tempted by the low price of foreign goods, ran in debt for more goods in one year

than the exports of the country could pay for in three, even if there had been no unfriendly discrimination against our exports in British ports. But there was. The whale fisheries of Massachusetts had formerly brought in \$800,000 in specie every year from foreign ports. Now whale oil was excluded from British ports by a tax of \$90 per ton. Trade with the British West Indies was restricted; no ships, no rice, tobacco, pitch, or turpentine could be sent there, as before the war. The cheapness of foreign goods discouraged American manufacturers. Pennsylvania, in 1785, passed a bill to protect the manufacturers of that state, by imposing duties upon more than seventy different imported articles, and by imposing a tonnage duty upon ships of foreign nations having no treaty with Congress. But how could Pennsylvania protect herself, unless all the other states would join with her? It was plain that there could be no real relief until Congress should have power to regulate commerce. The legislature of that state so represented to Congress in 1785.

In May, 1785, the town of Boston caused the following entry to be made upon its record: "Peace has not brought back prosperity; foreigners monopolize our commerce; the American carrying trade and the American finances are threatened with annihilation; the government should encourage agriculture, protect manufactures, and establish a public revenue; the confederacy is inadequate to its purposes; Congress should be invested with power competent to the wants of the country." The legislature of Massachusetts passed a resolution to the same effect. Massachusetts, New Hampshire, and Rhode Island severally passed acts of retaliation upon Great Britain, forbidding exports from their harbors in British ships, and taxing the tonnage of incoming foreign ships. These acts were declared to be temporary expedients, "until a well-guarded power to regulate trade should be intrusted to Congress." To the cries of distress from the states, with regard to their foreign trade, Congress gave some attention. But the Congress of peace was more feeble than the Congress of war. Its members were divided in their views as to the wisdom of intrusting to the central government absolute and unlimited power over the regula-

tion of commerce. The five southern "staple states," as they were called, had no ships or seamen, and they hesitated to give the monopoly of the carrying trade to the eastern and northern states.

"The spirit of commerce," they said with much warmth, "is the spirit of avarice." Even the delegates from Massachusetts receded from the position of their state, and were willing to give Congress only temporary control; the cry went abroad that to give Congress more power was to create an aristocracy to dominate over the states. Congress sent John Adams and John Jay to England, to see if a better commercial plan could not be agreed upon. The answer of England in substance was: "You have as one people neither power, coherence, nor integrity enough to justify your pretension to treat with us. You are one state to-day and thirteen states another day. If we want to make any regulations we will make them with the states separately." France was more friendly in her dispositions, but politely intimated that in dealing with Congress she would bind herself, but could not feel sure that she would bind the states.

Then, there was the distress caused by paper money. Every state issued it. Its purchasing capacity varied from day to day. Virginia was the first state honorably to extricate itself from this gross dishonesty. It was not enough for one state to provide honest money, if the other states still clung to the dishonest.

Several of the states passed laws tending to impair the legal remedies necessary to make people pay their debts. As Grayson of Virginia put it, the Congress ought to have the power to prevent the people of the states from cheating each other, or as it was finally expressed in the Constitution, from "impairing the obligation of contracts."

There were four causes which more clearly than all the others disclosed the utter weakness of the confederacy, which, after several years of distress, finally led to the formation of a new and stronger Constitution. First, the want of power to regulate commerce; second, the want of power to raise money to pay the national debts and to support the national government both at home and abroad; third, the want of power to

provide a uniform and good currency ; fourth, the want of power to forbid a state to pass laws impairing the obligation of contracts.

In addition to these wants there was a difficulty about the western lands. It was generally agreed that these ought to be sold for the benefit of the states, since all had united in the war which wrested them from the British power. Virginia, in 1784, helped pave the way to a more perfect union by ceding to the United States her territories northwest of the Ohio. New York had ceded her claims in 1781.

The vast extent of the country was an obstacle. What could the citizens of New Hampshire and Georgia know of each other ? What roads there were were bad, and the wilderness spread out from the rivers and sea-coast in vast and trackless expanses. The delegates from the distant states who came to the Congress at Philadelphia took weeks to perform the journey.¹

It seemed in 1785, and the beginning of 1786, that the public apathy, the dissensions in Congress, and the selfishness of the states were obstacles too formidable to be overcome. Washington, who had been the leading advocate of such amendments to the Articles of Confederation as should give the confederacy the real power of a nation in its commercial, financial, and foreign affairs, began to be discouraged. New York, as early as 1782, had resolved "to propose to Congress to recommend, and to each state to adopt, the measure of assembling a general convention of the states, specially authorized to revise and amend the confederation." But in 1785 the change in politics reversed the attitude of the state. She did not now favor any diminution of her state importance, or of her growing revenue from import duties.

Since the peace, Congress had been constantly begging the states to permit the confederacy to establish and collect duties upon imports. All the states, except New York, had confessed the propriety and wisdom of the request. New York insisted

¹ Charles C. Pinckney of South Carolina felt moved to say in the Constitutional Convention, that he himself had prejudices against the people of the eastern states before he came there, but would acknowledge that he had found them as liberal and candid as any men whatever.

upon reserving these revenues to herself, but consented to pay her quota of the confederate charge. The states began to impose duties upon the imports from other states. One state devised measures to punish another. Every state seemed to have abandoned the Union and reverted to its original separate condition. New Jersey finally became so exasperated that she voted to pay no part of the last requisition of Congress until all the states should have accepted the measure of the federal impost for the benefit of the general treasury. This was secession, and seemed to end all. Meanwhile action had been taken by Virginia which opened the way out of the peril.

It was done under the lead of James Madison. Virginia and Maryland had been negotiating together respecting their joint jurisdiction over navigation in the Chesapeake Bay and the Potomac River. Commissioners had agreed upon a plan which was laid before the legislature of each state. In December, 1785, Maryland signified to Virginia her acceptance of it, and at the same time proposed that Delaware and Pennsylvania be invited to coöperate in a plan for a canal between the Chesapeake and Delaware rivers. Thus a scheme of interstate commerce among some of the states was projected, which ought to extend upon just terms to all. Maryland proposed that all the states should be invited to meet and regulate the restrictions upon commerce. Madison, who was a member of the Virginia legislature, saw his opportunity. He prepared a resolution for the appointment of commissioners, to meet such commissioners as should be appointed by the other states, "to take into consideration the trade of the United States, to examine the relative situation and trade of the said states; to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony; and to report such an act to the several states relative to this great object as, when unanimously ratified by them, will enable the United States in Congress assembled effectually to provide for the same." This resolution he procured a Mr. Tyler, who was not suspected of wishing to give to the confederacy overmuch power, to introduce. It was permitted to sleep until the last day of the session, when it was brought forward and

adopted without debate. Madison was placed at the head of the commission. This resolution was sent to the other states, and four of them responded.

On the 11th of September, 1786, the commissioners of New York, New Jersey, Pennsylvania, Delaware, and Virginia met at Annapolis.

A minority of states could not wisely do more than recommend action. The commissioners therefore prepared a report to their respective states, and sent a copy of it to the other states, recommending a meeting of commissioners from all the states to be held at Philadelphia on the second Monday in May, 1787, "to take into consideration the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union."

Congress, which, to use the words quoted by one of its members, had long halted over the question, "whether it is better to bear the ills we have, than fly to those we know not of," did not take it kindly that the subject was to be referred to a convention, and at first refused to indorse the recommendation, but after delegates from several states had been appointed, did indorse it with this qualification: "For the sole purpose of revising the Articles of Confederation" and reporting to Congress. With this indorsement, all the states except Rhode Island appointed delegates.

Virginia was the first to act, and the name of Washington stood at the head of her list of delegates. He hesitated longer than was his habit before deciding to accept. Keenly as he felt the necessity of such action, he doubted whether the people would consent to delegate sufficient power to the central government to make it efficient and respected. He disliked to impair his great fame by linking his name to a failure. He finally yielded to the wishes of others. His acceptance secured respect for the proposed convention.

Meanwhile a rebellion broke out in the western part of Massachusetts, known in history as "Shays' Rebellion." The rebels were people who owed money and could not pay it, or did not want to. The laws of the state authorized imprisonment for

debt. These debtors conceived that the laws, lawyers, courts, and judges were public enemies. They determined to stop by force the holding of any more courts. They gathered in great numbers, bearing banners upon which were inscribed, in the language of the Declaration of Independence, the rights of the people, and the source of the authority of government. They did not cause much destruction. Indeed, they fled before, and finally surrendered to, the militia of the state, and order was restored. But they caused great consternation, not only in Massachusetts, but in other states. If the mob should rule in Massachusetts, it would soon rule in the other states. The foundations of government seemed imperiled when those who owed it obedience and enjoyed its protection rose, not to substitute a better, but to efface all government. It was felt that there ought to be a central power, able and ready to put down such a rebellion, in whatever state it might arise. It is difficult to appreciate at this day the extraordinary impulse that this Massachusetts mob gave to the movement for a better general government.

The powers conferred by the several states were not uniform. Virginia, Pennsylvania, and New Jersey appointed their delegates "for the purpose of revising the Federal Constitution;" North Carolina, New Hampshire, Delaware, and Georgia, "to decide upon the most effectual means to remove the defects of the Federal Union;" New York, Massachusetts, and Connecticut, "for the sole and express purpose of revising the Articles of Confederation;" South Carolina and Maryland, "to render the Federal Constitution entirely adequate to the actual situation." Rhode Island held aloof. She was governed by a class of men who wanted to pay their debts in paper money, and she did not wish to surrender her power to collect duties upon the goods that came into her port. The trade of Newport at that day surpassed that of New York. Connecticut came in reluctantly, and New Hampshire late in July, 1787.

There were great names in the ranks of the opposition to a convention. Samuel Adams, the foremost organizer of the movement for independence, was one. Inured to poverty, he found solace and strength in his sense of personal liberty. He

believed that great governmental power was fatal to liberty; liberty, he thought, to be safe, must divide and scatter power; the people could be trusted to unite to resist a foreign tyrant—the Revolution had proved that; but they should not concentrate their power over themselves lest ambitious tyrants should seize it and turn it against them. John Hancock shared the same fear. He saw in many of the revolutionary actors self-seeking men; he feared their ambition and distrusted their patriotism. He would not trust Washington himself. Conceding his virtues, his successors would lack them. Jefferson was absent from the country, but it was well known that he did not want any fixed central power over the states. Let the states accord or withhold such power as every demand arose, and then they never would lose their rights. Shays' Rebellion, in his view, was a pardonable outbreak,—the assertion by the people of their superiority over the government, and thus wholesome in purpose, though unwise in the particular case.

Patrick Henry refused to attend the convention. Virginia was his sovereign, and he would tolerate in nothing a superior over her. These would-be framers of a new national constitution did not, he thought, know what they were about. The requisitions of Congress upon the states were his ideal of national means. The nation should not have power, independent of the consent of the states. The Union, to be tolerable, must always rest upon the states for authority and support. The states would thus always be sovereign. James Monroe of Virginia was of the same opinion. George Clinton, the vigorous and efficient governor of New York, indorsed Henry's views. John Adams was not a delegate. John Quincy Adams was in college, but in after years he recorded his lament over his early effusions against the proposed constitution. It was better, these men thought, to be exposed to danger from external enemies than to be protected by a tyrant at home. In the one case, there would remain the sense of liberty and the purpose to maintain it; and in the other, dependence upon a superior would entail loss of manhood and the habit of servility. It must be admitted that these theories had attractions for noble minds. But there were selfish reasons also. New York en-

joyed the income which importations brought to her port. We have seen that Rhode Island feared the loss of her commercial advantages. Great as were the difficulties of the confederacy in meeting its obligations, they pressed with little weight upon any individual state. The public debt might be defaulted, but the public creditor knew his risk when he lent his money, and never felt sure of getting it again. Besides, most of the domestic debt had been purchased by speculators toward whom little obligation was felt. As to the foreign debt, the requisitions, helped out by the sale of public lands, would probably pay it some time or other, and the sooner if there should be no central government to waste the money. Admitting the evil, it was less than that of the remedy proposed for its cure. Many said, let the foreign trade go. Traders are not the best citizens. The temptation to gain debauches them. Agriculture was the true employment; the people could sell here and there in friendly ports enough to buy what was indispensable and could not be produced at home. Liberty dwelt in the fields and in the forests. Great governments were the desire of ambitious men. Pomp and power and splendor attended them. These seemed the greater, the greater the weakness and wants of the people. Liberty was for the people; let the people beware of giving to ambition the means to subvert it.

CHAPTER VI.

THE CONSTITUTIONAL CONVENTION.—ITS MEMBERS.—THEIR VIEWS.—
DIFFERENT PLANS.—THE DISCUSSION.—COMPROMISES.—FINAL COM-
PLETION OF THE CONSTITUTION.—DEPENDENCE OF THE UNION UPON
THE STATES.

THE convention was called to meet on the second Monday of May, 1787. Eleven days passed before the delegates from seven states—a majority—appeared. Then an organization was effected, and Washington was made president of the convention. The delegates from some of the other states came in.

The convention is justly noted for the ability and conservative character of its members. Altogether there were fifty-five, more than half of them college graduates.

George Washington and Benjamin Franklin were there. Washington was certainly the foremost in that honor and respect which came from great services rendered to his country. His general education was defective. He was not much of a reader, not a debater, not quick in perception, but in solidity of judgment, fairness of mind, dignity of character, firmness of purpose, and consecrated devotion to his country, he was the ideal American. Take him all in all, alike what he was and was not, what he did and forbore to do, he is the greatest man in all our history. Franklin was then more than fourscore years of age. He was renowned throughout the civilized world as a great Utilitarian philosopher, a leader in experimental science, and an ornament of the human race. Indeed, he is the greatest man of the colonial age, and he would have been a great figure in the greatest age. There was some thought of making him president, but his physical strength was not equal to the position, and he requested the appointment of Washington. Among the younger men was James Madison of Virginia, destined, after long service in behalf of his country, to become

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the fourth President of the United States. He was studious, modest, and thoughtful, and of exceeding wisdom in council. He had had an instructive experience in the Continental and Confederate Congresses. His influence in shaping the Constitution as it is was greater than that of any other man. He was the last survivor of that body, and a grateful country justly honors him as the "Father of the Constitution." I M

Alexander Hamilton came from New York. He was but thirty years of age, but for many years had been the adviser of Washington, and was already famous for his marvelous ability. He had a genius for the solution of governmental problems. In the keeness and grasp of his intellect, he had no superior in the convention, and many of his admirers thought he had no intellectual superior anywhere. But his influence in the convention was lessened because he wanted to frame a stronger government than his associates thought it wise to establish. He would give the government stability and strength. He would have the executive and senate hold office for life. He distrusted a democracy. Wherever, he said, it had existed, and in whatever age, it was a failure; the vices of the people always came to the front, and the people were crushed by their own incapacity.

Charles C. Pinckney was a delegate from South Carolina. His broad culture and liberal views gave him great weight in the convention. James Wilson of Pennsylvania was a Scotchman. He surpassed all others in his exact knowledge of the civil and common law, and the law of nations. His zeal and wisdom were alike great. He was afterwards one of the justices of the Supreme Court of the United States. Oliver Ellsworth and Roger Sherman came from Connecticut. They were wise men. But their usefulness was greater from the fact that they came from a state that had always been free, and been governed upon the representative principle.

George Mason was a delegate from Virginia. He studied profoundly the various methods proposed to give the new government its necessary powers without sacrificing the independence and sovereignty of the states. He enriched the minds of others by his pregnant suggestions, but the final result was

unsatisfactory to him, and he advised his state to reject the Constitution.

The delegates had this great help. The Union already existed and had existed since 1775. It already had the Constitution set forth in the Articles of Confederation. Experience had shown that this Constitution was too weak to accomplish its professed objects. There were some other objects, notably the regulation of commerce, the inviolability of contracts, the uniformity of currency, the payment of the public debt, which ought to be provided for. Every state had its own constitution; these constitutions afforded examples of the means by which the people were willing that governmental powers should be executed. The Articles of Confederation had familiarized their minds with the idea that a common government was practicable. The previous dominion of Great Britain over the colonies presented the same idea, in an objectionable form, it is true, but with the suggestion that if properly limited and made dependent upon the will of the people, its benefits could be secured and its odious features avoided. Experience had shown that the Union must do its own business and not depend upon the states to do it. The new Constitution must adopt means to secure the ends helpful to all the states, and provide safeguards against encroachment and abuse. This was largely a question of the choice of means,—it was obvious that these means must be similar to those already employed by the states. But behind it all stood the spectre of a central power wielding both purse and sword,—a power which if enthroned might break every chain that hampered it. Bad as was the existing system, it was the weakness of discord, not the tyranny of strength.

Respecting a democracy which Hamilton so greatly distrusted, they thought that it could be managed in the states under the state constitutions; but to frame a central government over the states and make it dependent upon a democracy unfettered by state limitations would be unwise. The powers of a central government must be limited to those which the states separately could not well perform; and to secure its fidelity it must be operated by officers and instrumentalities emanating from the states or the people of the states.

The states must coöperate with the Union ; it must be grafted upon them as the parent stock from which it would as if by natural processes derive its nourishment, vigor, and growth.

The first business of the convention was the adoption of rules. Each state was to have one vote. Such was the rule in the Confederate Congress. Seven states made a quorum. The convention was to sit with closed doors, and everything was to be kept secret : nothing was to be given to the public except the completed work. This injunction of secrecy was never removed. Fortunately James Madison kept a pretty full account of the debates and proceedings, all in his own hand. He lived nearly fifty years after the adoption of the Constitution, dying on the 28th day of June, 1836. After his death, the government paid his widow \$30,000 for his manuscripts. These were published in 1840, are known as the "Madison Papers," and give to us the most authentic report extant of the debates of that body.

Virginia was the greatest state, and it was expected that she would take the lead in the convention and outline some scheme for adoption. Accordingly, Edmund Randolph, the governor of the state, and one of her delegates, introduced in fifteen resolutions the plan submitted by that state.

The following extract from his remarks upon the introduction of the resolutions is instructive : —

" The confederacy was made in the infancy of the science of constitutions, when the inefficiency of requisitions was unknown ; when no commercial discord had arisen among states ; when no rebellion like that in Massachusetts had broken out ; when foreign debts were not urgent ; when the havoc of paper money had not been experienced ; and when nothing better could have been conceded by states jealous of their own sovereignty. But it offered no security against foreign invasion, for Congress could neither prevent nor conduct a war, nor punish infractions of treaties, or of the law of nations, nor control particular states from provoking war. The federal government has no constitutional power to check a quarrel between separate states ; nor to suppress a rebellion in any one of them ; nor to counteract the commercial regulations of other nations ; nor to defend itself

against encroachments of the states. From the manner in which it has been ratified in many of the states, it cannot be claimed to be paramount to the state constitutions, so that there is a prospect of anarchy from the inherent laxity of the government. As the remedy, the government to be established must have for its basis the republican principle."

Governor Randolph meant by the "republican principle" that the power to be vested in the government should come from the people, as distinguished from the states, and hence the government would act upon the people directly from its own authority and energy, instead of indirectly through the states; that the government should act itself instead of requesting the states to act, and that the people who conferred power upon the states should in like manner confer it upon the general government; that the general government should be a government of the people in like manner as in the states. If both the state and the general governments should derive power from the people, then both governments would be the creation of the people and for their benefit.

The plan presented contemplated the abandonment of the Articles of Confederation, and the adoption of a national Constitution, with executive, legislative, and judicial powers. Mr. Pinckney of South Carolina also presented a plan with features resembling our present Constitution. The discussion of Governor Randolph's plan provoked at the outset the important question: What had the convention authority to do, — to frame a new Constitution or amend the old? The convention wisely determined to permit the discussion of all plans proposed, and thereby find out what plan the delegates were most likely to unite upon, and thus instructed, they would be better able to work it out. The discussion disclosed the general opinion to be that it did not much matter what the authority of the delegates was, since whatever they recommended would have to be approved by the people or by the several states before it could become obligatory, and therefore they had better present the best plan they could.

Upon this subject Washington made the following weighty speech from the chair: "It is too probable that no plan we

propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God."

The convention considered the resolutions of Governor Randolph in committee of the whole. A measure may be adopted in committee, and rejected by the House.

On the 13th of June the chairman of the committee, as the result of the discussion, reported to the convention nineteen resolutions; the first was that a national government ought to be established, consisting of supreme legislative, judiciary, and executive departments. The second, third, fourth, seventh, and eighth resolutions provided that the legislature should have two branches, the members of both to be elected by the people of the several states, in numbers equal to their proportion of the whole number of all the people.

Thus a central government with all the departments necessary for its independent existence was proposed. One of the delegates characterized it as "an audacious scheme." It was the heroic remedy needed for the crisis.

The debate which followed soon disclosed a serious division of sentiment between the large states and the small. The large states favored a national, self-acting, central government, with a legislature of two branches, both to be chosen by the people in the several states proportionately to their respective numbers. Thirty thousand people were assumed as the proper number for one representative in Congress. Taking this basis, and reckoning, as was proposed, five slaves as equal to three white men, Virginia would have ten; Massachusetts, eight; Pennsylvania, eight; New York, six; Maryland, six; Connecticut, five; North Carolina, five; South Carolina, five; New Jersey, four; Georgia, three; New Hampshire, three; Rhode Island, one; Delaware, one.

Thus it was seen and said that Virginia would be ten times greater and stronger than Rhode Island or Delaware. The small states objected to this reduction of their significance. When the vote was taken in committee, to which the subject

was again referred, this national scheme, as it was called, was carried by a vote of six states to five. The six states were Virginia, Pennsylvania, Massachusetts, North Carolina, South Carolina, and Georgia. The five states were New York, New Jersey, Connecticut, Delaware, and Maryland. New Hampshire was still absent, and Rhode Island never was present.

New York voted with the smaller states, and the two Carolinas and Georgia voted with the greater states. New York did not then foresee that in the race of progress she was so soon to pass from the fourth in rank to the first.

North Carolina and Georgia were then great in extent. Their territories extended from the ocean to the Mississippi, and they confidently anticipated a greatness in the future far surpassing that of their northern sisters. Georgia was greater in territorial extent than the whole island of Great Britain. It seemed inevitable that these vast tracts of land, favored with a fertile soil and a genial climate, would become, not remotely, the homes of a mighty people.¹

The division was entirely natural. The larger states, with all their population, wealth, and industries, were unwilling to be placed on a par in the new government with the little ones. Should such a state as Virginia, ten times as great as Delaware, New Hampshire, or Rhode Island, be stripped of her power by their combinations, and compelled to act as they might dictate? In such a government as it was necessary to form, should not the representatives of the people be in proportion to the number of the people? Should the inhabitants of Virginia be disfranchised as the penalty of their number? They might as well be governed by Great Britain as by a combination of little states. But the small states were equally in earnest. They said, Is not each a sovereign state, and can a sovereign state, without humiliation, enter into any agreement with another state, except upon terms of equality? The moment she surrenders her equality of power, she throws away her rights and power to protect herself. If representation is to be according to population, then the states are unequal in power; the great

¹ South Carolina ceded her unoccupied western lands to the United States on the 8th day of August, 1787, while the convention was in session.

states will make what laws they please, however injurious or disagreeable to the other states, and they will always prevent the small states from making any laws, however necessary and proper, if not agreeable to their views.

Mr. Luther Martin, a delegate from Maryland, was very emphatic in his opposition. "It is," he said, "a system of slavery which binds, hand and foot, ten states in the Union, and places them at the mercy of the other three." A state rights party began to exist. This party, under the lead of Mr. Patterson of New Jersey, asked and obtained time in which to mature a scheme of federal equality, as it was termed. He submitted a plan of amendment of the Articles of Confederation so as to "render the federal Constitution adequate to the exigencies of government and the preservation of the Union."

The leading features of this scheme were: Congress was to be given power to raise a revenue by levying and collecting duties on imports; to regulate commerce; to establish appellate courts having jurisdiction in matters of revenue; to pass laws to enforce obedience to the requisitions of Congress; to elect a federal executive of several persons.

The convention now had two schemes before it. The one was called the Virginia, the other the New Jersey plan; the one a National, the other a Federal plan. One party proposed a new Constitution, the other proposed to amend the old.

In the debates that followed, the central question was: Shall we have a government of the people, or a compact of the states? The debates were earnest, able, animated, and not always free from threats of disruption and dissolution of the convention. Many delegates became alarmed. The aged Franklin was so apprehensive of the impossibility of agreement that, in order to tranquillize the minds of opposing delegates, he proposed that a chaplain be appointed and prayers be read.¹ He soon after suggested a compromise of the opposing plans, and a committee

¹ It is stated in some histories that Franklin's suggestion was adopted. But Mr. Madison is authority for the statement that this is not true. He himself opposed, because he was afraid that if prayers were now read for the first time, the fact would alarm the country by the suggestion that the affairs of the convention were in a desperate strait. The actual reason why they did not engage a chaplain was because they had no money to pay him.

was appointed to mature it. The committee agreed upon a compromise, and the convention adopted it.

The main features of the compromise were that in the Senate every state should have the same number of senators; that in the House every state should be represented in proportion to its population.

It was urged that thus the equality of the states in the one body, and the equality of people in the other, would be secured, and as both bodies must concur in the passage of a law, the states would be a check upon the people, and the people a check upon the states. Moreover, the states as such would have representation in one chamber, and the people in the other. The plan of the representation of the people and of the states precludes without constitutional amendment the admission of any representatives of the administration in either house, — a plan frequently advocated in recent times as affording an opportunity to the executive department to present such suggestions in debate as its experience in administration would make valuable. It is plain, however, that to make the administrative officers a third estate in the government would lessen its dependence upon the governed.

It was also urged that the members of the lower house should be frequently chosen, the better to represent the people. But such a body would lack experience, wisdom, stability, and dignity of character; it would be swayed by popular prejudice and clamor; it would be misled by demagogues; it would be rash in its expedients and propositions, and liable to do great mischief, with possibly the best of motives. It would be in the highest degree useful as the representative of the people, but not entirely safe as their sole legislator. Besides, the sense of the responsibility of the individual member would be dissipated among so large a number; and the wisdom of the few might be overborne by the passions, the prejudice, or the cupidity of the many.

These suggestions were weighty. Given, it was said, a second house, of fewer numbers, chosen not by the people but by their wiser state legislators, and for longer terms, and the result is a smaller body of wise, able, experienced, and safe men. Such a

body would moderate the impetuosity and rashness of the popular branch, would detect and correct their folly, and approve their just resolves. Each body would be helpful to the other, and with both a very high degree of safety would be secured.¹ The argument is no doubt sound, and stands approved by the subsequent experience in this country and in nearly every constitutional state in Europe.

Mr. Hamilton, after the Constitution was adopted, pronounced it to be the chief maxim of the government to raise up departments whose interests and inclinations should be opposed to each other, so that if one, yielding to some peculiar pressure, should prove false or faithless to the interests of the nation or the liberties of the people, another, remaining independent or unmoved, might defend, maintain, and preserve them.

There was also much discussion with respect to the choice, the personality, and the power of the executive.

Should there be one president or several? Great fear was expressed lest one man, whether called president, governor, consul, or chief, would develop into a king. "Unity in the executive office," said Randolph, "is the foetus of monarchy."

The argument in favor of one man instead of several was, that with one there could be no discussion in council, no division in decision or action, no escape from responsibility. The argument was strong, and it prevailed. How should he be chosen? By the people, by the governors of the states, by their legislatures, by Congress, or by electors to be chosen as each state should appoint? They decided that the President was too important an officer to be chosen directly by the people. Sherman of Connecticut said, "The less the people had to do with

¹ It is said that Washington and Jefferson once at supper discussed the wisdom of having two legislative chambers. Jefferson contended that one was enough, according to the plan then prevailing in France. Washington contended for two. In the course of the discussion Jefferson poured out his hot tea from his cup into his saucer. "Why," said Washington, "do you do that?" "To let the tea cool," said Jefferson. "Quite right," said Washington, "and just so we need two legislative chambers to give the judgments of legislators a chance to cool." On the other hand, Franklin induced the state of Pennsylvania to adopt one chamber only, by his remark that a legislature with two chambers is like a wagon with a horse before and a horse behind, one pulling in one way, and the other in the other. The state subsequently corrected the error.

the government, the better." Gerry of Massachusetts said, "All the evils we experience flow from an excess of democracy." Mason of Virginia and Wilson of Pennsylvania combated these views. "Without the confidence of the people," said Wilson, "no government, least of all a republican government, can long endure."¹

The South Carolina delegates thought that the people were so widely scattered that the fewer elections by them the better. The New England States wanted elections often. To allow the states to choose a president would maintain all the states upon an equality. It was finally agreed that there should be a college of electors, chosen in each state in such manner as its legislature should direct, equal to the whole number of senators and representatives to which the state should be entitled in Congress; and that these electors should choose the President. The idea, borrowed from the Constitution of Maryland, was that wise men, carefully chosen, would themselves exercise this important office with great care and wisdom. Our fathers did not foresee that after all their expressed distrust of the people, this body of electors would be elected by the people to register their choice as previously expressed in their party conventions. While in practice the intention of the convention is defeated, the will of the people prevails.

¹ Sherman of Connecticut thought the executive ought to be dependent upon the legislature, reflect its will, and be chosen and be changed by it. Such a system practically prevails in England and in France. It is obvious that under it the veto power would cease to be exercised, since, if the executive should not agree with the legislature, he would be displaced if he should not resign. Certainly his independence would be diminished, although his influence might be increased, as it is not probable that Congress would choose one whom it should not respect, and it would be slow to break with the man of its own choice. The veto power is now rising in importance and in the frequency of its exercise, partly because each department is independent of the other, and often of different political sympathies, and because weak men sometimes vote for bad measures out of deference to local sentiment, trusting to the corrective of the veto. Thus the character and integrity of the executive may supply the defect of these qualities in Congress. Strong men usually rise to the measure of their responsibilities, and whatever we may expect of Congress, we do expect the President to have the courage of his convictions. Nothing can be more inspiring than the confidence of millions of people that in great crises the President will do right. Whatever may be said theoretically in favor of the dependence of the executive upon the legislature, experience has shown that it is fortunate that neither his appointment nor tenure depends upon the legislative pleasure.

How long should the President hold office? Hamilton urged, during good behavior, or for life. Some proposed one term, others another. It was at one time resolved that he should serve for seven years and be ineligible to reëlection. Later, the term was changed to four years; the clause declaring his re-ineligibility was dropped out upon the final revision, for reasons not disclosed. It is probable that the reason was that the convention supposed that Washington would be made President, and that it would be desirable to continue him in the office for life.¹

A vice-president was provided for to act as President in case of a vacancy, or of the disability of the President. It was seen that his office would be a weary void, and to give him some relief and excuse for existence, he was made President of the Senate.

The duties of the President were prescribed. As the first officer of the nation, it was agreed that he ought to be the commander-in-chief of the army and navy, and of the militia, when called into the actual service of the United States. He was permitted to make treaties by and with the advice and consent of the Senate, and could therefore make peace; but he was not permitted to declare war, lest his ambition should lead the nation into useless wars. That power was vested in Congress.² Vast and almost unlimited executive powers were conferred by the provisions, "The executive power shall be vested in a President," and "he shall take care that the laws be faithfully executed." He was authorized to convene Congress or either house upon extraordinary occasions; give Congress information as to the state of the Union; recommend measures to its consideration; grant pardons; and appoint, by and with the advice and consent of the Senate, the officers of the United States, whose appointment is not otherwise provided for in the Constitution. The Constitution does not expressly vest in the Senate any power with respect to the removal of these officers.

¹ A presidential election has become a disturber of peaceful pursuits. It would be some relief to adopt the longer term discarded by the convention.

² The President, however, may precipitate a war by his conduct toward a foreign power. The enemy may declare it, or wage it. The President must recognize the fact of war when it exists, whether Congress has declared it or not.

That power, unless the law which creates the office otherwise provides, resides in the President alone.

Various propositions were made to surround the President by an executive or privy council, or some sort of advisers. Mr. Mason of Virginia proposed that he should have a council of six, two from the Eastern, two from the Middle, and two from the Southern States. Mr. Mason could not well take thought of that vast empire west of the Mississippi, over which the flags of Spain and France alternately waved, which was to become a part of the nation. The discussion ended in abandoning all these suggestions. The only expressions in the Constitution authorizing a cabinet are, "the principal officer in each of the executive departments," whose opinion the President may require in writing, "and heads of departments" and "any department." His independence of Congress and influence over legislation were provided for by giving him a qualified veto power. His fidelity was secured by his oath of office and liability to impeachment. Great as is the presidential office by reason of the powers and duties intrusted to it by the Constitution, it has become still greater because Congress has intrusted it with many discretionary powers which it can limit, or prescribe the means and methods of performance. Its greatness is partly of constitutional and partly of legislative creation. It is often said that the President has greater power than any constitutional monarch: if this is so, it is largely because Congress has made it so. It is our pleasure, not our obligation, that makes him so great.

The federal Judiciary was the subject of the careful attention of the very able lawyers of the convention. Under the Articles of Confederation, Congress had power to appoint courts for the trial of piracies and felonies on the high seas, and courts with appellate jurisdiction in all cases of captures, and Congress itself had appellate jurisdiction of all disputes and differences between two or more states concerning boundary jurisdiction or any other cause, and of conflicting private claims to the same land under different grants of two or more states. The state courts assumed jurisdiction of prize and capture cases. Over one hundred appeals had been taken to the Federal court. A

few cases also had arisen under the other heads of jurisdiction. The systems were cumbersome, and the power of the Confederacy to enforce the decrees of its courts was dependent upon the support of the states. Controversies had arisen respecting the rights and property of the Confederacy, over which its courts had no jurisdiction. There was need of a uniform rule of decision upon Federal cases in the several state courts. Experience under this limited and crude system familiarized thoughtful minds with the idea of a Federal judiciary, and led them to consider how far it should be extended, and how it could be improved.¹ The laws, treaties, obligations, and rights of the Union, and of individuals and parties under them, would be of uncertain force unless maintained, expounded, and enforced by the Union itself. If their exposition should be committed to the several states, they would be frittered away by neglect and by hostile and differing interpretation. There should be one ultimate power of decision and enforcement, and that must be the judicial power of the Union. That power, having no will of its own, should utter the will of the supreme law. Behind it should be the power of the nation, but the wisdom and moral influence of the judicial power should be so pre-eminent that the sword which was ready to support it should rust in its scabbard. Thus too the Union should pledge its justice against the danger of its power.

To make this department as independent as possible, it was agreed that the judges should hold office during good behavior. It was also agreed that it should not have any jurisdiction over cases arising in a state, between its citizens, in respect to matters wholly controlled by state laws. But the court should have jurisdiction over cases controlled by the laws of the United States, its Constitution, and treaties. And then it was seen that when a case should arise between citizens of different states, the courts of a state might be prejudiced against the suitor resident in another state ; that controversies might arise between states, which ought to be fairly tried and decided ; that a state would sometimes sue a citizen of another or of a foreign state ; that the United States might become a party to a suit ; and that

¹ See 131 U. S. Reports, Appendix xi.; Carson's Supreme Court U. S. 27 *et seq.*

admiralty and maritime cases would spring from our shipping interests. In these cases the United States court would be the proper tribunal. If a foreign ambassador or consul should be sued while he was accredited to the United States, the courtesy due him and his country would make it fitting that he should not be required to answer except in the most exalted court of the nation. If a state should be a party, it would not be dignified for it to be cited by any inferior court.

It was resolved to provide a Supreme Court and inferior courts. Out of compliment to states and the representatives of foreign countries, their cases should be tried, in the first instance, in the Supreme Court; but all the other cases should be tried in the first instance before some one of the inferior courts. To the Supreme Court was given appellate jurisdiction. All this seems very simple. But in these simple regulations lies the most admirable and important feature of the whole Constitution. Without it the system might have failed. This appellate jurisdiction of the Supreme Court has, more than any other agency, composed dissensions, settled conflicting claims, and defined the powers by which the nation has developed into its stable greatness. Experience under the confederacy had taught the lesson that, whatever the powers vested in the national government, they must be exempt from the negative of the states, otherwise they would be sooner or later destroyed. It was foreseen that, whatever guards might be written in the national Constitution to preserve the national authority, they would prove worthless, unless some final and supreme power should be competent to enforce them and to declare all state infringement upon the national power void.

Thus was presented a vital question of the utmost delicacy and difficulty. Suppose the states should enact laws in conflict with the United States Constitution, and its laws and treaties; how could the difficulty and danger be overcome? The delegates were familiar with the theory that the crown, with respect to legislation in the colonies, might interpose its veto; and it was suggested that the like power ought to be vested in some department of the national government with respect to state laws in conflict with the United States Constitution, laws, or

treaties. But the exercise of such a power would inevitably be the occasion of irritation to the states, and would imperil the whole system. Suppose state after state should pass such laws, and the United States should veto them, the offended states might make common cause against the United States, and thus destroy the national government. Inseparable from it was another problem equally momentous. Suppose the United States, notwithstanding its enumerated powers, should assume to itself powers not delegated, and encroach upon the reserved powers of the states. What remedy would the states have, except resistance and rebellion? The difficulty was at last happily solved by giving the Supreme Court appellate jurisdiction, and thus making it the final arbiter. One section extended the judicial power to all cases in law and equity arising under the Constitution, and another — suggested by Luther Martin as an expedient way to obviate the danger and difficulty of a direct negative upon state legislation — declared, “This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” Of course, all enactments, national or state, in contravention of the supreme law, must be void.

Under these happy provisions, whatever law any state may pass, no matter how much it conflicts with the Constitution of the United States, it may go upon the statute book of the state without exciting the least apprehension or alarm. There it will quietly repose until somebody seeks to assert or deny the right or duty which this law purports to confer or enjoin. The opposite party then challenges the state law as contrary to the supreme law of the Constitution of the United States. Under the practice adopted, if the state courts hold the state law to be unconstitutional, no appeal is necessary to vindicate the national power ; but if the state courts sustain the validity of the state law, an appeal lies to the Supreme Court of the United States, and that court will decide whether the state law is valid or void.

If it decide that it is void, it is to all intents and purposes not merely practically repealed, but declared never to have existed.

In like manner, if Congress enact any law in conflict with the Constitution of the United States, whether by violating the rights reserved to the states, or by exercising powers not conferred by the Constitution, the Supreme Court, whenever a case comes before it in which the question is raised,—and its determination is decisive of the case,—declares the act of Congress void.

It is true there are some cases of the appropriation of public moneys, and the exercise of powers by the general government, in which the Constitution may be violated, and no individual be so injuriously affected as to have any proper cause to commence a lawsuit to test the question. In such cases the Supreme Court cannot interfere. The only protection against such abuses is such an expression of the popular will as shall command the respect of Congress, or lead to the amendment of the Constitution, or defeat the reëlection of the offenders.

The powers of the executive and judicial departments having been agreed upon, it remained to prescribe the powers which should be given to Congress, and to draw the lines as plainly as possible between the functions of the state and national governments. A resolution was adopted that power should be conferred upon Congress "to legislate for the general interests of the Union, for cases to which the states are separately incompetent, and for cases in which the harmony of the United States might be interrupted by the exercise of individual legislation." The convention tried to work close to the lines thus laid down. "The general interests of the Union," or as it was put in the Constitution, "general welfare," was always construed to mean that welfare "for which the states are separately incompetent" to provide, a signification which statesmen are not always able to appreciate. This construction the convention illustrated by carefully enumerating the powers delegated to Congress, and to the United States. Thus the great powers to declare war, to provide an army and navy, to coin and borrow money, to lay and collect taxes and duties, to acquire and protect a seat for the national capitol, to enact patent and copyright laws, to

establish post-offices, to admit new states, to govern territories,
to make uniform rules for naturalization and bankruptcy, and
a uniform standard of weights and measures, to establish the
courts of the United States, plainly concern the general welfare.
They are powers for the proper exercise of which the states are
separately incompetent.

The cases in which power was expressly given to Congress were understood to be some of the cases in which “the harmony of the United States might be interrupted by the exercise of individual legislation;” but there were others so obnoxious in themselves, or dangerous to the general welfare, that they were felt to demand express enumeration. The times had been fertile in suggestions of small confederations of states. The Eastern States, the Middle States, the Southern States, were by many supposed to be natural divisions, and to have so few interests in common as to invite the formation of three confederacies some time in the future. There were also the people who had built their cabins beyond the Alleghany Mountains, whose outlet to the sea was by way of the Mississippi River. It was feared that these adventurous and fearless pioneers, cut off by the mountains from the Atlantic seaboard, might form their own confederations, joining possibly with Spain, who held the mouth of the great river and barred the outlet to the Gulf. Hence it was provided that “no state shall enter into any treaty, alliance, or confederation.” A few years later Aaron Burr was brought to trial for treason against the United States. The possibility of founding an empire, whose boundaries should embrace the vast water-shed which discharges its floods through the deltas of the Mississippi, charmed the imagination and tempted the ambition of this brilliant and active man. But he stopped short of levying war, and hence escaped conviction.

The states were expressly forbidden to make any paper money, or anything else but gold or silver a legal tender; to coin money, to emit bills of credit, or to pass any law impairing the obligation of contracts. Thus it was sought to promote the general welfare by cutting off these fruitful sources of dishonesty.¹

¹ “Propositions to countenance the issue of paper money, and the consequent

It was thought that possibly a state might, under peculiar circumstances, exercise, with the consent of Congress, some national powers; and it was provided that, without such consent, no state should lay any duties upon imports or exports, except the trifle necessary to pay for their inspection, or lay any duty of tonnage, keep troops or ships of war in times of peace, engage in war unless actually invaded or in imminent danger of it, or, such was the repeated caution of the convention, enter into any agreement or compact with another state or foreign power.

It was assumed by the members of the convention that no powers could exist in the United States government except those enumerated in the constitutional grant of powers, and those which it would be necessary to employ in order to carry out the enumerated powers. They refused to insert a general bill of rights. They did, however, dispense with any religious qualification for office under the United States; they exacted no property qualification for office or the right of suffrage; and provided that the trial for crime should be in the state where it was committed, and that the citizens of each state should be entitled to all the privileges and immunities of citizens in the several states. When the citizen of New York should go to New Jersey, he should be entitled to just as fair treatment as if he were a citizen of New Jersey, and New Jersey could make her bill of rights as full as she chose.] It was thought prudent expressly to provide that the privilege of the writ of *habeas corpus* should not be suspended unless when in cases of rebellion or invasion the public safety may require it; that no bill of attainder or *ex post facto* law should be passed; that the trial of all crimes except in cases of treason should be by jury, and they defined the crime of treason. They were unwilling that the outrages which in the previous century had been perpetrated in England in violation or in default of these wholesome provisions should be possible here; and lest any officer of the Union should be corrupted by a foreign power, he was forbidden to accept, without the consent of Congress, any present,

violation of contracts, must have met with all the opposition I could make." (Gouverneur Morris to Timothy Pickering, 1814.)

emolument, office, or title from such power. They prohibited the giving of a preference by any regulation of commerce or revenue to one port over another; or interfering with free commerce by vessels between states; they forbade the drawing any money from the treasury except under an appropriation made by law, and withdrew from the states the power to pass any bill of attainder, or *ex post facto* law, or to confer any title of nobility.

Slavery was discussed. It was regarded as a state institution, with which it was not expedient for the convention to interfere. Such interference would cause the Constitution to be rejected by the slave-holding states. The subject, however, came up in considering the question of enumerating the people of a state for the purposes of taxation and representation. Should the slaves be counted? Yes, if people; no, if property. There were but few slaves in the Northern States. In some states they had been set free, and in some others the process had begun.

The northern sentiment was hostile to slavery on moral grounds, and especially hostile to the slave trade; though northern men were not free from the reproach that they had shared in the business and profits of the trade.

If the slave is property, said the northern delegates, you have no more right to count him than we have to count our mules. If we allow you to count him, we encourage the further importation of slaves, which we want you to stop. The South replied: We grant the slave is property, but five slaves can produce as much as three freemen, and are therefore equal to three freemen in developing the national wealth. You must obtain national revenue by direct taxation; we agree that taxation and representation must go together; and if we count the slave for the purposes of representation, we thereby consent that he be counted for the purposes of taxation; you thus will get the benefit of our counting him. We are willing to compromise the question on that basis. The South also urged that one fifth of the slaves, the old, the young, and the invalids, were burdens upon their owners, and ought not to be taxed. The compromise was accepted; five slaves became the equal of three free-

men for the purposes of representation and taxation.) Whether the North yielded its conscientious scruples any more easily because of the supposed benefit of counting the slave for the purposes of taxation cannot be answered. If so, it gained little; for there never has been much resort to direct taxation. The duties upon imports, and the excises on whiskey and tobacco, and sometimes on other articles, have provided the revenues. Direct taxation has been necessary in only a few cases, and then but for a short time. As no capitation or direct tax could be laid unless apportioned among the several states according to their respective numbers, the danger of taxing slavery out of existence was averted, an income tax restricted, and taxation of real estate by the Union rendered impracticable.

That duties should be laid upon importations from foreign countries was conceded to be a power which ought to be vested in the United States and taken away from the states. Thus a national revenue would be provided, and the duties would be uniform in every port. The commercial states of the North thought they were making a great sacrifice in surrendering this privilege, and they urged that the like power to impose duties upon exports should also be vested in the general government. But the South was firm in its opposition to this proposition. The South was not a commercial people. It exported largely tobacco grown in Virginia and North Carolina, and rice and indigo grown in the two Carolinas and Georgia. Cotton was scarcely known. The cotton gin and the power loom had not then been invented. Northern men were traders. Their merchant marine was known in almost every foreign port. The northern delegates pressed the question of duties upon exports. Our exports, said the two Carolinas and Georgia, are our only means of getting any money. We must buy from you, and pay duties upon the goods your ships bring from abroad. If you insist upon taxing our resources at both ends, both when we buy and sell, the business is at an end, we will stay out of the Union. But we consent that you tax imports — that tax falls upon the consumer. We and our slaves are consumers, and perhaps we shall consume more than you and thus pay more. The North was constrained to agree, and the result was that a

tax might be imposed upon imports, but no tax could ever be imposed upon exports.

The power to regulate commerce with foreign nations was much discussed. It involved the power to pass laws to regulate the entry of foreign ships into our ports, and to exclude them. The North wanted to give the United States full power. As the South did not own ships, it could get no benefit from excluding foreign shipping, and might be compelled to pay too high prices to the North on freights. But foreign countries had not dealt with the American traders liberally ; the British Orders in Council excluded our ships from the West India ports altogether. We must have the power of retaliation, or we might be driven from the seas. The United States must have the power to make the regulations, and they must be uniform in all the states, in order that favorable treaties might be made. The South agreed to the justice of the proposed power, but wanted protection against its unjust application.

The South finally proposed the provision that Congress should regulate commerce with foreign nations and among the states, but that it should take a two thirds vote to pass any navigation laws. Give us that protection and we are safe. Not so, said the North ; you may prevent us from getting the protection we need against foreign severity and injustice. The question of the importation of slaves arose, for that was involved in the regulation of commerce, and the laying of duties. The North said slaves are imports and should be taxed as such. That will produce some revenue, and will tend to restrict the slave trade. The South replied that the importation of slaves did not amount to much, and they would stop it themselves, for they would soon have all the slaves they wanted. The North pressed the tax upon slaves imported, and the restriction of their importation, with great firmness. The South thought that it had better concede something upon the subject of navigation in order to escape pressure upon the slave question. And so another compromise was effected. Congress was given power to regulate commerce with foreign powers and among the states ; the two thirds vote was not insisted upon. The power to impose a tax of ten dollars upon every slave imported was

conceded, and a provision inserted that Congress should not prohibit the importation of slaves prior to 1808.

It is proper to say that in 1808 Congress did pass a law prohibiting the importation of slaves, but punishment for the violation of the law was not inflicted until the administration of Abraham Lincoln. No tax, however, was ever imposed upon any slave imported.

Provision was made for the surrender of criminals, and of fugitive slaves. All the necessary details were perfected ; the several provisions carefully expressed in plain and direct phrases, and arranged in suitable order.¹ The revisers struck out the word "national" from the Constitution, lest it should cause the opposition or unnecessary fear of the too jealous champions of state rights ; the names of the several states were stricken from the preamble, and "The people" inserted instead, in order to signify that the power creating the Constitution came from the people, not from the states, and because all the states named might not ratify the Constitution. Provision was made for the ratification of the Constitution, not by Congress, not by the legislatures of the states, but by the conventions of at least nine states, thus again signifying the people as the source of power.

The reference in the preamble and final article to the people as the ratifiers and ordainers of what had been "done in Convention by the unanimous consent of the States present" seemed to be a reluctant recognition of the true source of power. The delegates considered that they were acting for their respective states. Their intent to preserve the states from the encroachment of the new union, to strengthen them by it, and even to give to them a larger field of national action, can at this distance of time be best exhibited by grouping together

¹ The style of the Constitution is largely due to its revision by Gouverneur Morris. "That instrument (the Constitution) was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit ; excepting, nevertheless, a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which expressing any one's notions would not alarm others nor shock their self-love ; and to the best of my recollection this was the only part which passed without cavil." (Gouverneur Morris to Timothy Pickering, November, 1814.)

some of the provisions of the Constitution. Such grouping will also show the basis of the contests over state rights during the first century of our constitutional history, and serve to complete the story of the framing of the instrument.

The legislative powers are limited to those "herein granted."¹

In the states all legislative powers not withheld are usually granted.

"The House of Representatives shall be composed of members chosen every second year by the people of the several states." The states prescribe the qualifications of the electors. The representative must be an inhabitant of the state in which he is chosen.² The legislature of each state chooses its senators from its own inhabitants.³ The Senate, that is, the states, must try all impeachments.⁴ No officer of the United States can at the same time be a member of either house.⁵ Each state shall appoint in such manner as its legislature may direct the presidential electors.⁶ The President is not permitted to declare war, but the power is vested in Congress as the representative of the states and the people.⁷ Congress can "raise and support armies," but a standing army may be used to oppress the people, and therefore it is provided that "no appropriation to that use shall be for a longer term than two years,"⁸ the precise term for which the people of the states intrust their representatives with power.

The United States has no militia apart from that of the states. The militia belongs to the states. Its services in the Revolution had been great, but its usefulness was impaired because its training and discipline differed in the different states, and in many cases it was without any systematic training. But the militia was dear to the people; it was a part of themselves; it could be called into service when needed, perform its duty, and then disperse and disappear in private life. The better the militia of the states, the less the need and danger of a standing army to consume the substance and threaten the liberties of the people.

¹ Art. 1, sec. 1.

² Ib., sec. 2.

³ Ib., sec. 3.

⁴ Ib.

⁵ Ib., sec. 6.

⁶ Art. 2, sec. 1.

⁷ Art. 1, sec. 9.

⁸ Ib.

To make the militia serviceable both to the Union and to the states, Congress has power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."¹ Also power "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States."² The power of the Union to call forth the militia is limited to these specified emergencies.³ The President is their commander-in-chief "when called into the actual service of the United States."⁴ But lest the tie between the state and its militia be weakened or severed, and the defenders of the state be perverted and bear arms against it, the Constitution expressly reserves "to the states respectively the appointment of the officers and authority of training the militia according to the discipline prescribed by Congress."⁵

In the war of 1812, Massachusetts and Connecticut construed these provisions so rigidly as to embarrass the administration in the prosecution of the war. The Supreme Court subsequently approved the broader construction of the federal government, thus making it practicable to give to the Union the control of the militia in case of necessity.⁶

"The United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion."⁷ By guaranteeing to every state a republican form of government, the Union would have no state with a different form of government to rely upon in aid of its oppression, and every state would continue to be republican in form, and be sure of the like continuance by the other states.

Instructed by "Shays' Rebellion," they thought it was proper that protection against domestic violence should be afforded. State sovereignty took instant alarm, fearing that the United States would insult the state by extending protection before it was asked, or would, under the pretense of protection, proceed to oppression. The provision was inserted that such protection should be given on the application of the legislature or of the

¹ Art. 1, sec. 9.

² Ib.

³ *Presser v. Illinois*, 116 U. S. 252.

⁴ Art. 2, sec. 2.

⁵ Art. 1, sec. 9.

⁷ Art. 4, sec. 4.

⁶ *Martin v. Scott*, 12 Wheaton Rep. 19.

executive of the state;¹ the presumption being that in the absence of such application no federal protection would be obtruded.

Out of the territory which the states had ceded to the United States, and were expected to cede, it was probable that new states would be formed. Provision was made for their admission: indeed, it was desirable that they should be admitted; the United States, if it should have provinces, might establish military governments over them, and by raising armies in them attain power independently of the states, and thus dictate to them.

No new state should be made by dismembering any other state, or by the junction of two or more states, without the consent both of Congress and the legislatures of the states concerned.² The large states feared destruction or encroachment by territorial division, the small ones annexation to other states.

Congress was forbidden to make any regulations respecting the territory belonging to the United States prejudicial either to the claims of the United States or of any particular state.³ North Carolina had ceded the territory now comprising the state of Tennessee to the United States, and had attempted to revoke the cession. That case and all other disputed territorial claims should not be prejudiced by any grant of superior control to the Union.

"No tax or duty shall be imposed by the United States upon articles exported from any state."⁴ Thus the Union should not prejudice the productiveness of a state.

The amendment of the Constitution depends upon the states. Upon the application of the legislatures of two thirds of the states, Congress must call a convention for proposing amendments.⁵ It is also provided that whenever two thirds of both houses shall deem it necessary, Congress shall propose amendments. In either case the amendments are proposed to the states or the people thereof; they may be ratified by the legislatures of three fourths of the states, or by conventions in three fourths thereof, according as Congress may propose one

¹ Art. 4, sec. 4.

² Art. 4, sec. 3.

³ Ib.

⁴ Art. 1, sec. 5.

⁵ Art. 5.

or the other mode of ratification. Nothing depends upon the aggregate vote of the states; the people of each state cast the vote of the state, and the surplus in one state cannot offset the deficit in another in any election. Three fourths of the states may disestablish the present system and replace it by another. No state, however small, shall be deprived without its consent of its equal suffrage in the Senate.

The President can make treaties and appoint the officers of the Union, but only with the advice and consent of the Senate.¹ The concurrence of the Senate was deemed to be the concurrence of the states.

Under the confederacy, the sessions of Congress had been disturbed and the safety of its members endangered by the violence of the mob. The state governments did not seem to be able or disposed to protect them. It would be undignified, and might prove to be unsafe, for the capital and officers of the nation to be dependent upon a state for security. But the Union had no territory suitable for a capital, and was not permitted to acquire any within the limits of a state, except with the consent of such state.² The like consent was made necessary for the purchase of places or sites within a state for post-offices, forts, magazines, arsenals, dock-yards, and other needful buildings. The dignity and sovereignty of the state must be considered, and her consent asked. The capital district should not exceed ten miles square. It might be dangerous to permit any greater extent of territory to be withdrawn from the jurisdiction of the states and exclusively governed by the Union. The states are at liberty to cede territory for the national purposes, but the United States has no power to take it when not ceded.

Other provisions reflect the high sense of the delegates of the dignity and equality of the states, and of their sovereign rank as the dispensers of justice and the protectors of their people. They provided that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."³ And that "The trial of all crimes, except in cases of impeachment, shall be by jury," and in the state where committed.⁴ "No preference shall be given by any

¹ Art. 2, sec. 2.

² Art. 1, sec. 8.

³ Art. 4, sec. 1.

⁴ Art. 3, sec. 3.

regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.”¹ The Union could not obtain favors from any state by granting them at the expense of the others.

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”²

Thus the delegates sought to strengthen the states by interweaving their fabric into the texture of the Union, and by rendering its existence so dependent upon their own as to make it unable and unwilling to try to exist apart from the states. They did not create the Union for its sake, but for that of the states and the people. Still further provisions for the protection of the states and the people against the Union were demanded and obtained by the ten amendments which were proposed by the first Congress and ratified by the states.

Time and experience have greatly modified the jealousy which the delegates felt in guarding the rights of the states, and in fixing their importance in the framework of the Union. The central government which our fathers most feared has proved to be the bulwark of the system. It prevents strife between the states, and secures their coöperation. It is the balance-wheel which secures constancy and regularity of operation, and, as it draws its motive force from all the states, any relaxation of energy by one, if not compensated by the increased vigor of others, is too slight to be a disturbance. This happy result is due both to the perfection of the system in its initial formation, and to the gradual development of sensible methods of operating it. The majority of the people have wished it success, and thus have shaped the means provided into ample and adequate means for the purpose. If the wreckers had obtained command, they could have found the rocks upon which to split the ship.

Mention has been made of many proposed but rejected provisions. Some others are worthy of notice. Among them are the propositions to elect senators for life; to require a property qualification of all officers; that the President be removed by

¹ Art. 1, sec. 9.

² Art. 4, sec. 2.

the majority of Congress; also upon the request of the legislatures of the several states; that the number of representatives from new states should never exceed those from the thirteen original states; that all federal cases be decided by the state courts in the first instance; that the President should have an absolute veto; that pardons should be approved by the Senate; that the Supreme Court should revise the proposed acts of Congress; that judges should be removed by the President on the application of Congress; and that the governors of the states should choose the President. The wisdom of the convention in rejecting these provisions seems to deserve applause.

Finally, on the 17th of September, 1787, the Constitution was completed. It was not satisfactory to all the delegates, and several refused to sign it. "Done in convention by the unanimous consent of the states present," is the language of the attestation clause, not by the unanimous consent of all the states, or of all the delegates. It was, however, signed by the large majority. President Washington was authorized to transmit it to the Congress of the United States, with the recommendation that it be submitted for adoption to a convention of delegates, chosen by the people in every state. A letter was addressed to Congress, from which the following is an extract: "In all our deliberations we kept steadily in our view that which appears to us the greatest interest of every true American, the consolidation of our Union. . . . And thus the Constitution which we now present is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable." And thereupon the convention adjourned, leaving the Constitution to abide its fate at the hands of the conventions of delegates to be chosen by the people.

CHAPTER VII.

RATIFICATION OF THE CONSTITUTION.—PROCEEDINGS IN THE CONVENTIONS OF THE SEVERAL STATES.

THE fate of the proposed Constitution remained doubtful for many months after the adjournment of the convention. Hamilton said it would be arrogance to conjecture the result. Madison, writing to Washington, said : "The majority in Virginia will be very small on whichever side it may be. The business is in the most ticklish state that can be conjectured." Delaware was the first state to accept it. Gratified by the concession of equality in the federal Senate, the ratification was prompt, enthusiastic, and unanimous. Pennsylvania was the second. The opposition was sharp, but Franklin was president of the state, and Wilson a delegate to the state convention. Their influence was great. Wilson was the only delegate to the state convention who had also been a delegate to the Constitutional Convention. His speeches in favor of the ratification of the Constitution are still quoted as aids to its exposition. The opposition was routed by bold and energetic measures, and the ratification was effected by a vote of forty-six to twenty-three. Then New Jersey and Georgia followed unanimously. Next came Connecticut by a vote of one hundred and twenty-eight to forty.

The result in these five states was the more easily obtained because the friends of the Constitution were prompt to act. With delay in the other states came a bitterness of contention which made the result doubtful. The first close struggle was in Massachusetts. The public creditor favored the proposed Constitution. He saw in it some hope of his long deferred pay. But the debtor class opposed it ; for it would put an end to cheap paper money, with which they hoped to pay their debts, when it became still cheaper.

The merchants, manufacturers, lawyers, and clergy, and the officers of the late continental army favored it. Massachusetts had lately been the theatre of Shays' Rebellion, of which mention has already been made. The insurgents had invoked the language of the Declaration of Independence to justify their uprising. In the Constitutional Convention at Philadelphia this rebellion afforded frequent illustration of the alleged danger of giving power to the people. The subdued insurgents were opposed to the new Constitution, and although disfranchised by law, twenty of them were chosen delegates to the Massachusetts convention, and took their seats unchallenged, as the colleagues of John Hancock, Samuel Adams, Fisher Ames, and Rufus King. Hancock and Adams scarcely favored the Constitution. They feared that it infringed upon the rights of the people, and especially upon the rights of the states. Hancock was long governor of the state, and was especially tenacious of state rights and state dignity.¹

The majority of the Massachusetts convention was clearly opposed to ratification. The discussion was long continued. Many objections were urged. The proposed Constitution did not say that the powers not conferred upon the United States were reserved to the states. It did not provide for a trial by jury in civil cases. It did not provide that a person must first be indicted before he could be convicted of crime. It recognized slavery and the slave trade. It had no bill of rights. It opened the door to Papists. It required no profession of religion as a qualification for office. Other objections were made. For a time it was supposed they would be fatal, but Hancock finally came forward as a mediator. He proposed that the Constitution be ratified, with an accompanying recommendation that it be amended in the particulars in which it was thought to be defective. His proposition was adopted, and the Constitution

¹ Washington, during his first administration, made a tour into the Eastern States and visited Boston. Governor Hancock at first refused to call upon him. He said that he was the governor of an independent state, and Washington only the chief of a confederation of states, and as the inferior in rank the President should make the first call. However, he yielded to the better judgment of his friends, and finally consented to do Washington the honor of first calling upon him.

was ratified by a vote of one hundred and eighty-seven to one hundred and sixty-eight.

Maryland next ratified the Constitution with much unanimity, notwithstanding the strenuous opposition of Luther Martin. Mr. Martin, it will be remembered, was a delegate to the federal convention. His objections are preserved in the letter which he sent to the Maryland legislature. The letter is a most graphic and earnest denunciation of the main features of the Constitution. Its closing words are interesting evidence of the earnestness of his convictions: "So destructive do I consider the proposed system to the happiness of my country, that I would cheerfully sacrifice that share of property with which Heaven has blessed a life of industry, I would reduce myself to indigence and poverty; and those who are dearer to me than my own existence I would intrust to the care of that Providence who has so kindly protected myself, if on those terms only I could procure my country to reject these chains which are forged for it." Mr. Martin was then about forty-two years of age, and it is pleasant to record that he lived under the new Constitution about forty years longer, and attained fullness of honor and distinction, without witnessing the calamities he foreboded.

South Carolina followed next, and ratified the Constitution by a majority of seventy-six, but recommended amendments substantially like those of Massachusetts. South Carolina was the eighth state; and, if one more could be obtained, the Constitution would take effect between the nine ratifying states. There remained the five states of Virginia, New York, New Hampshire, North Carolina, and Rhode Island. The state convention of Virginia was called for the 2d of June, 1778, of New York for the 17th, and of New Hampshire for the 18th of the same month. The result was expected to be adverse in every one of these states.

In Virginia the opposition was led by Patrick Henry. He no doubt believed that the proposed Constitution would lead to the destruction of the states and of the liberties of the people. He was a natural master of oratory and eloquence. His speeches had place in our earlier reading-books, as specimens of vehement and patriotic oratory. But his capacity was small

for dispassionate examination and logical argument. He was a lawyer. Jefferson said that his opinion upon a legal question was not worth a brass cent. Nevertheless he struck, fair and true, the line that separated the old government from the new. He said in opening the debate: "The Constitution is a severance of the confederacy. Its language, 'We, the people,' is the institution of one great consolidated national government of the people of all the states, instead of a government by compact, with the states for its agents. The people gave the convention no power to use their name."

Henry was ably seconded by Richard Henry Lee, William Grayson, and George Mason, great names in Virginia in those days, and still deservedly held in the highest estimation. Mason, as we have seen, was a sturdy champion of state rights in the convention at Philadelphia. James Monroe followed their lead. James Madison and Governor Randolph were the leading champions of the new Constitution. Their conspicuous leadership in the federal convention will be recalled. Randolph, however, had refused to sign the Constitution, and this impaired the force of his advocacy. John Marshall, afterwards chief justice, came to their assistance, and foreshadowed, in his remarks upon the judiciary system, the great power it was destined to wield, under his direction, in keeping both nation and states true to their appointed functions. The debate lasted a month. It may be read with instruction, as it is reported in the volumes of Elliot. The ratification prevailed by a majority of ten in a vote of one hundred and eighty-six. After all, the influence of Washington procured the result. Bancroft calls him "The anchor of the Constitution." The ratification was absolute and unconditional; but it was accompanied by the solemn declaration that the people had the right to resume the powers granted to the United States whosoever the same should be perverted to their injury or oppression,—a proposition which is exceedingly plausible but dangerous; for it does not provide any disinterested judge of the acts which may be alleged to be a perversion of the powers granted.

Meanwhile, the state of New Hampshire had ratified the Constitution, but the fact was not known in Virginia.

✓ The opposition to the Constitution was great and bitter in the state of New York. Fortunately the convention was held so late that New Hampshire, the ninth state, had ratified while the New York convention was engaged in its heated discussions. Two thirds of the delegates were elected to oppose it. George Clinton was governor of the state and a member of the state convention. He, too, was a strong state rights partisan, and an opponent of the new scheme. His official influence had been great enough, as early as 1783, to induce the legislature to refuse to bestow upon Congress the power to collect revenues through its own officers. After the British evacuated the city of New York, the state established a custom-house there for the sole benefit of her own treasury. As the foreign importations for New Jersey, Vermont, and a part of Connecticut came through this port, New York could really tax these states. She was willing to pay the federal requisitions, and did pay them, but was unwilling to give up her income from imported goods. Practically, New York could dictate the commercial policy of the country. It was this claim of right on the part of the state that led so many other states to consent to vest the regulation of commerce in the United States. Thus, it finally happened that the selfish policy of Clinton, and, it may be added, of Rhode Island, defeated itself. Two of the delegates to the federal convention from New York, Robert Yates and John Lansing, withdrew from it when the vote was announced which committed the convention to the formation of a new Constitution. They were willing that the Articles of Confederation should be amended according to the New Jersey plan, presented by Mr. Paterson; but were so thoroughly opposed to a consolidated central government, acting directly upon the people and not through the states, that, in obedience to what they supposed to be the sentiment of their state, they withdrew, and did not again return. They justified their action in a letter addressed to Governor Clinton. This letter met with great acceptance. Mr. Lansing was now a delegate to the state convention, and a strong leader of the opposition to ratification.

The friends of the Constitution felt, long before the convention assembled, that public discussion might be useful in over-

coming the hostile attitude of the state. Accordingly, a series of essays in exposition of the Constitution was written by Hamilton, Madison, and Jay, over the common signature of "Publius." These essays were published in a newspaper, between October, 1787, and June, 1788. They were written for immediate effect upon a topic which greatly excited the public. One would naturally suppose that they would not be entirely free from partisan bias, and that, after the issue had been decided, they would share the usual oblivion of fugitive publications. But they were destined for a different fate. They were subsequently collected and published in a volume styled "The Federalist." From that day to this, "The Federalist" has held unequaled rank as an authority upon the construction of the Constitution. Chancellor Kent, one of the most accomplished of American jurists, writing fifty years later, said: "I know not, indeed, of any work on the principles of free government that is to be compared in instruction and intrinsic value to this small and unpretending volume, not even if we resort to Aristotle, Machiavel, Montesquieu, Milton, Locke, or Burke." Mr. Justice Story made it the basis of his Commentaries. The years that have elapsed since Kent and Story wrote, years full of intellectual activity and constitutional discussion, would have pushed "The Federalist" from its pedestal, if its title to supremacy had not been indefeasibly grounded in merit; but the successive volumes of the United States Supreme Court reports attest its value as authority.

Hamilton was a delegate to the New York convention. So were John Jay, Chancellor Livingston, and James Duane, all friends of the new Constitution. Hamilton was the great leader in its support. We have a report of the debates. We can now see from them how well equipped Hamilton was. It was a part of his policy to prolong the debate until he could hear from Virginia or New Hampshire. He had his couriers at Richmond and Concord, ready to bring him, as fast as fleet horses could pass over bad roads, the decisive news from the convention at either place. The New York convention sat at Poughkeepsie. On the 24th day of June Hamilton's messenger from Concord rode into Poughkeepsie, bringing the news

that New Hampshire, three days before, had ratified the Constitution. Now, indeed, the situation was changed. There was no longer a confederacy; the Union was already formed. There was no longer a choice between the old system and the new; the state must either join the new system or stay out of it.

New York was not favorably situated for a separate nation. New England on the east, and New Jersey and Pennsylvania on the south, belonged to the new Union. Canada was on the north, and Great Britain still held the frontier posts as a surety that treaty obligations would be performed. Delay, with its altered circumstances, finally brought to Hamilton and his party the victory that had been denied to argument and eloquence. But the Anti-Federalists were reluctant to yield, and the debate was prolonged. These debates afford instructive commentaries upon the Constitution. The main propositions advanced by the respective parties were much the same as in the other contested states. They may be condensed as follows:

We do not oppose a Union; indeed, we desire one, said the Anti-Federalists; we have one under the Articles of Confederation; defective, we grant, not in its principles, but somewhat so in the details of execution. We are willing to amend these so as to allow Congress to levy and collect the tax to meet its requisitions, if the state should not voluntarily pay them. Why ask for more? Why make this untried experiment of a great central government, acting directly upon the people, and compelling both states and people to yield obedience to laws which are to be, in the execution of the powers conferred, the supreme law of the land, any state law or act to the contrary notwithstanding? Then, when there are any disputes as to whether the nation or the state has the right to act, the national, not the state, court has the right to decide, and our fears tell us how that decision will always be made. You are creating a great central power, which, if it desires so to encroach upon the rights of the states as practically to destroy them, needs only to declare that it is necessary to do so in order to carry into execution the powers conferred upon it; then, if its court decide that it is right, the destruction is complete, unless we can take up arms to defend ourselves; and we cannot defend ourselves,

first, because the United States may take our able-bodied men to recruit its army ; and, second, because it has an unlimited power of taxation for necessary purposes ; and if the United States compel payment of the taxes which it may decide necessary to levy upon us, we shall have nothing left for state purposes, and cannot even support our troops, if we have the men left from whom to recruit them. How do we know that your President will not make himself king ? In the United Netherlands, the chief magistrates were once elective, now they are hereditary. The Venetians, once a republic, are now governed by an aristocracy. History furnishes no example of a confederated republic coercing the states composing it by the influence of laws operating upon the individuals of those states. Your experiment is without precedent or example. It is false in principle, for there cannot be two supreme powers over one individual, namely, the governments of the state and of the United States. No man can obey two masters. Your country is too vast in extent to be governed by one power. You create a national legislature who may vote their own pay, without limitation ; who are too few in number to represent the people, — New York having only six ; and who are in nowise amenable to the state ; what security have we against their combinations against our liberties, and their corruption in squandering the contributions they extort from us ? Why give the South increased representation because of the slave ? Do you wish to compel us to sanction slavery ? Representation implies the free agency of the persons represented ; the slave cannot be represented, because he is not a free agent ; and it is false in principle to give his master double representation, once on his own account, and then again upon account of his wrong to another. And small as our representation is, Congress may reduce it ; for the provision is, the representatives shall not exceed one for every thirty thousand, but it does not say that it may not take twice, or many times thirty thousand to be entitled to one. We prefer more than six ; the more, the better we are represented, and the less risk of corruption. The representatives should be chosen every year, instead of every two years ; six years as the term of a senator is much too long ;

the government will fall into the hands of the few and the great ; it is not a government of the people ; it is in everything too far removed from the people, and must inevitably become a government of oppression ; not perhaps immediately, but gradually, by construction and by amplification of jurisdiction and power. This may be slow, it may be almost imperceptible ; but knowing the natural tendency of human nature to hold power when once gained, and to extend it when its gratifications have been experienced, we plainly see that the states are to fall beneath the United States, and the people will be crushed beneath a government too remote to hear their voice, and too well assured of its own power and permanency to heed it. True, the Constitution assumes to guarantee to every state a republican *form* of government ; alas, for the substance, when the *form* only remains !

Governor Clinton, speaking for the party of which he was the acknowledged leader, in substance said : I desire a federal republic, in which the states shall form the creative principle. Every state must be equal and equally represented ; its representatives must look solely to it for their support, and for their instructions ; they must collectively vote in obedience to its will, and be separately subject to its recall. State sovereignty is the shield against the encroachments of national power.

Hamilton and his associates replied : The radical vice in the Articles of Confederation is that the laws of the Union apply to the states only in their corporate capacity. Our misfortunes proceed from a want of vigor in the continental government. New York and Pennsylvania are the only states that have fully complied with the federal requisitions. New Hampshire, which has not suffered from the war, is totally delinquent. So is South Carolina. The other states have only partly complied. Suppose we amend the Articles as proposed, giving the nation power to compel the state to comply with the requisitions. That may mean war against a hostile state. Do you want that ? If the state refuse to comply, how is the nation to proceed against such a hostile state ? If you confer the full and unlimited powers of taxation, and also control of the army, upon Congress, you establish a despotism, which means all the power in

one body. You are afraid to trust the representatives of the people. You can have no government of your own unless you trust somebody. Some confidence in our fellows is the basis of human society. Unless you trust your kind, you are divided by anarchy, and are the spoil of the strongest. But there are provided all reasonable checks. There are three departments of government, each a check upon the other. The President is the representative of the people. He can veto bad laws. So the two houses are checks upon each other; and these failing, there sits the court, appointed for life, removed from the passion of the partisan, and with no inducement but to do justice. You elect your own representatives; these will be in positions of honor, and if not honorably filled, you will send others in their place. Besides, the President and judges may be impeached for wrong-doing. Human selfishness and ambition are also your safeguards. The public servant is under the eye of the public, a public quick to see and prompt to strike dead the madness of tyranny and corruption. What reasonable precaution is omitted? Your country is too large to admit of a pure democracy, wherein all the people assemble, deliberate, and decide. You must from necessity be represented, and better so; for men may be incapable of public affairs and yet choose one of their number to represent them who is capable. And so a representative government is the best. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their character was tyranny, their figure deformity. Their assemblies were mobs; the field of debate was the theatre of enormity, of mad ambition, of bloodshed; it was matter of chance whether the people were blindly led by one tyrant or another. You want more representatives. The ratio is one to thirty thousand; you want it one to twenty thousand. We cannot argue with your emotions, but may not one man understand the interests of thirty as well as of twenty? Remember that he will not represent all your interests, but only those of federal concern. These are principally commerce and taxation. Are these questions generally understood by many, or by few? The people may choose whom they please, and we hope they will choose their

best. Suppose they choose bad men ; they must conform to the scheme of the Constitution, and if that is wise and good, we may yet enjoy good government from bad men. Bad grain does not grow from good seed, though the wicked sow it. We hope that the popular elections will be pure, and unbounded liberty of choice allowed. Public opinion will be a great element of safety. Your state governments will, by their watchfulness and jealousy of federal encroachment, be a check upon it. The national and the state governments have their respective spheres ; each will hold the other to its place, and the two, thus related, form a double security to the people. Surely, if you can appeal to the nation against the injustice of your state ; if you can ask your state to interpose against the injustice of the nation, you will, indeed, be fortunate. We predict that the national government will be as natural a guardian of our freedom as the states themselves. But how open to corruption is the confederate Congress ! Each state has one vote ; nine states must concur in the most important measures. Suppose nine states present, and a foreign enemy bribes the two delegates who represent one state. The other eight are instantly paralyzed, and the measure thwarted which may be essential to your national existence. What a difference between the old and the new ! The old was made of rotten materials put together in haste. The new government will not encroach upon the just powers of the state. Does it remodel the internal police of any state ? No. Does it alter or abrogate any of its civil or criminal institutions ? No. Any of its forms or safeguards of justice ? No. Does it affect the domestic or private life of any citizen ? No. Does it ask the state to surrender any power or function essential to its welfare ? No. The declared object of the new government is to insure domestic tranquillity, provide for the common defense, and promote the general welfare. How is it to be done ? Not in the least by taking away any of the safeguards or means by which every state may now compass these blessed objects, but by strengthening those safeguards and means by the added power of all the other states ; not separately, either, in their capacity as states, but by the union of all the people who dwell therein. The

allotment of representatives in proportion to the population, the inclusion of three fifths of the slaves in ascertaining the people to be represented, the exemption of exports from taxation, the non-interference with the importation of slaves until 1808, the imposition of a tax upon slaves imported, were matters of accommodation, agreed to in order to secure the assent of the states more especially benefited by these provisions. You may, indeed, discuss them upon their merits, and possibly condemn them; but the states which insisted upon them as important are not here to persuade or reply to you: unless you respect the accommodation, it is in vain to remind you that to some of the states equality in the Senate and power in Congress to regulate commerce, to make navigation laws, to impose taxes upon imports, to exercise any power with respect to the slave, were conceded in the same spirit of compromise. It is easier to calculate the evils than the advantages of a measure, and we can only deprecate that appeal to the passions which creates a prejudice fatal to deliberate examination. We have sought to equalize the power of the states; to balance the departments of the government; to lodge the sword in one department and the purse in another; to connect the virtue of the rulers with their interests; to make the Union dependent upon the states for its executive and senate; to make the states independent of the Union, except in those matters of highest concern to the safety, protection, and benefit of all. We thought it right that the Union, in the exercise of these powers of high concern, should not be impeded or trammelled by the interposition of the state. Such powers may not be efficiently used when most urgently needed, unless they are completely and supremely held. The members of the Union will be stronger than the head; the number of their powers will always be greater. The Union can exercise only such powers as are conferred; the state can always exercise all that are not given to the Union.

Such is a skeleton of the principal points urged upon the one side and the other in the great debate.

After the news from New Hampshire, some of the Anti-Federalists manifested a disposition to ratify the Constitution, upon condition that a convention of the states be called to adopt

amendments, which this convention should propose. The news of the ratification by Virginia followed in a few days. The proposition was then made that New York should ratify, but reserve the right to secede from the Union within a certain time, if dissatisfied with the experiment. The Federalists were of the opinion that a conditional ratification was no ratification at all, and in this view they were confirmed by the opinion of Madison. The Federalists, however, were willing to unite in the recommendation of amendments; and they moved that the ratification be made in the full confidence that the amendments proposed by this state would be maturely considered, and that until a convention be called and convened for proposing amendments, the United States would not exercise certain powers within the state. The test vote was upon the question, whether the ratification should be upon condition that the proposed amendments be made to the Constitution, or in full confidence that such amendments would be made. The "full confidence" plan prevailed over the conditional plan by a majority of only two, in a vote of sixty, and thereupon New York came into the Union.¹

The convention recommended a great number of amendments to be proposed, and then the convention adjourned. There were rejoicings and celebrations by the Federalists, and not a little expression of discomfiture on the part of the Anti-Federalists.

North Carolina remained out of the Union until November, 1789, and Rhode Island until June, 1790. Rhode Island was quickened to come in by the fact that Congress, in fixing the duties upon imports, treated this state as a foreign country. The ratification by nine states having been certified to the Congress of the Confederacy, that body adopted a resolution

¹ While this question was pending, Mr. Gilbert Livingston spoke substantially as follows: "I desire to explain my vote. The great and final question is about to be taken. I have had a severe struggle between duty and prejudice. I entered this house determined to insist upon amendments to the Constitution, before I would consent to support it. But my present conviction impels me to yield the point. Not that I believe the Constitution safe unless amended. But in our present situation with respect to sister states, the wisest thing to do is to vote for the ratification, in full confidence that the amendments advised by us will be adopted. I shall so vote, and appeal to my constituents to ratify my action. I shall not cease to labor to procure a revision of the Constitution."

fixing the first Wednesday of March, 1789, as the day when the new government should go into operation. As the day fell on the 4th of March, that date became fixed for the beginning and the end of congressional and presidential terms. The Continental Congress itself stopped on the 3d day of March, 1789. Its vitality had long been so feeble that its final dissolution attracted no attention.

It is a curious reflection that the United States government, to begin with, was nothing but a few sheets of paper, lying in the drawer of the secretary of the confederate Congress. Would the words ever have life, substance, strength, significance, supremacy? Surely not, without the nourishment, support, and defense of the friends of the system.

CHAPTER VIII.

PRACTICAL ESTABLISHMENT OF THE GOVERNMENT UNDER THE CONSTITUTION.—FIRST MEASURES.—INFLUENCE OF HAMILTON AND JEFFERSON.—THE HAMILTONIAN ERA OF LIBERAL CONSTRUCTION.—FORMATION OF PARTIES.—DECISIVE MEASURES OF THE GOVERNMENT.

THE 4th of March, 1789, was the day appointed for the new government to go into operation. The city of New York was named as the temporary seat of government. Her citizens by private subscription provided the means to furnish suitable chambers in which the senators and representatives should meet. But on the first day few senators and representatives appeared. Those who did come were not a little annoyed at the delay of the others. It did not augur well for the new government. Besides, the disparaging pleasantry of the enemies of the new order of things disturbed their composure. But the roads and weather were bad, while some of the elections had been too recent to admit of so early an attendance on the part of those chosen. After waiting a week without obtaining a quorum, a circular was issued to the absentees. This circular pointed out "the indispensable necessity of putting the government into immediate operation." But not until the 31st day of March did a quorum of representatives appear, and the senators delayed until the 6th of April. The two houses then assembled and counted the electoral vote. It was found that George Washington had all the votes cast, and John Adams had half of them, less one. Under the Constitution, as it then was, Washington became President, and Adams Vice-President. The first presidential electors were chosen by the people in five states, and by the legislatures in five states. The friends of the new Constitution mainly did the voting; those opposed remained away from the polls. The state of New York did not participate in the election of the first President, nor did her senators sit in the

first session of the first Congress until July 19, 1789. The bitterness with which Governor Clinton regarded the unconditional ratification of the Constitution, and his determination that there should be another federal convention to propose amendments to it, account for the attitude of the state. But Hamilton, Madison, and the other leaders decided not to incur the risks of another convention.

Richard Henry Lee of Virginia declared that it was only common fairness to wait and see how the new government would work; that he was opposed to any premature amendments. As he had been a vigorous opponent of the adoption of the Constitution, his position had great weight; many others took the same ground; and the effort to convene another federal convention failed.

Washington was not inaugurated until the 30th day of April. After the electoral vote was counted a messenger had to be sent to Mount Vernon. Washington had been making ready to go to New York. His estate, great as it was supposed to be, did not supply him with sufficient ready money. We find him borrowing six hundred pounds of his friend, Captain Conway, to enable him to pay some of his debts, and make a decent figure as the first officer of the nation. Meantime, under the lead of Madison, the House of Representatives began the work of making the necessary laws to place the nation in operation and enable it to obtain some money.

The first act of the first Congress prescribed the oath to be administered to the officers of the government. This oath requires them to support the Constitution of the United States, unlike the constitutional oath required of the President, to "preserve, protect, and defend the Constitution." The second act was to impose duties upon certain imports. Its preamble recited its purpose "to be for the support of the government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures." In after times and down to the present day, when the constitutional right to levy duties for the purpose of *protection* of manufactures has been challenged, one answer has been, to point to this preamble and say, "Thus our fathers understood it." On the other hand

it is urged, and I think justly, that the debates show that the main purpose was to obtain revenue; but as protection could at the same time be given, the duties were adjusted to afford it.¹ Mr. Madison said that the states, ripe for manufactures, ought to have their particular interests attended to. One object in adjusting duties to afford protection, as well as to obtain revenue, was to reconcile the states to the new revenue system by the promise of the advantage which protection held out to them; and it was also believed to be good policy to develop every resource of the country essential to its own support, to the end that it need not be dependent for supplies upon any foreign market.

This Congress provided for the organization of courts; created the departments of State, War, and Finance; prescribed their respective functions; and provided a postal system. There were only seventy-five post-offices then in the country. An aggregate of \$659,000 was appropriated for the expenses of the government, not including any provision for the public debt. This proved to be sufficient for the expenses of the first year. Since 1862 the daily income of the government has averaged a greater sum.

This Congress confirmed the confederate Ordinance of 1787 for the government of the territory northwest of the Ohio; passed navigation laws; regulated the coasting trade; provided for light-houses; for the sale of public lands; the government of the territories; for the naturalization of aliens; proclaimed a policy respecting the admission of new states, and fixed the salaries of public officers. In short, it passed the laws necessary to start the new government. Plainly, it labored for the public good with singleness of purpose.

¹ "Several of the states under the former system had imposed protective duties in order to encourage manufactures, and they desired that this protection should be continued by the Union." (Maclay's Journal)

William Maclay was senator from Pennsylvania in the first Congress. He kept a journal, which has recently been published. He was an honest man of plain tastes, and of simple, direct, and narrow views. The system upon which the new Congress proceeded to organize the government seemed to him to be one of great extravagance, and he fancied that dishonest, mercenary, and ambitious personal motives governed the majority. His journal abounds in exclamations against the measures proposed, and the men who advocated and voted for them. He believed that the tendency and the intent were in the direction of monarchy.

In creating the Department of State, the question arose whether the officer to be appointed by and with the advice of the Senate might be constitutionally removed by the President. The bill contained the words, "to be removable from office by the President." The Constitution is silent upon the subject of removal, except by impeachment. It provides that judges shall hold their offices during good behavior, but is silent as to the terms of the other appointees of the President. It was argued that the power to appoint "by and with the advice and consent of the Senate" implied the like advice and consent for the removal. But the power to vote a man in is distinct from the power to vote him out, after he is in. The House of Representatives agreed that, since the executive power was vested in the President, the power of removal was incident to the office of President; and if that were not so, then by law the President ought to have the power to remove an unfit executive officer, and that the Constitution authorized Congress to confer this power. The Senate, more jealous of its powers, divided evenly upon the question, and the casting vote of the Vice-President secured the power of removal to the President. In the presidency of Andrew Johnson, Congress reversed this early construction, and prescribed that officers appointed by the President by and with the advice and consent of the Senate could be removed only by the like advice and consent. Congress in 1887 readopted the early construction.¹ From the requests of several of the states Madison prepared and Congress proposed twelve amendments to the Constitution for adoption by the states. These amendments were framed the more clearly to express the limits set to the powers of the general government. The Constitution conferred certain powers upon the government. The argument was urged, and was sound, that powers

¹ In *Parsons v. United States*, 167 U. S. 324, the Supreme Court, in 1896, held that Section 769 of the Revised Statutes of the United States, which provides that "district attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates," does not deprive the President of the power to remove such officer within the four years. Whether a statute prohibiting such removal would be constitutional depends upon the question whether the Constitution vests the power of removal in the President irrespective of any statute. This the court declined to decide. The case contains an interesting history of the question.

not conferred did not exist in the general government, and should not be used. But it was wise, in view of the widely expressed apprehension that this might not prove true, to state it expressly. The states adopted ten of the twelve amendments, and rejected two. Eight of these amendments protect the citizens from the oppression of the United States, and the ninth and tenth express the non-existence in the United States of undelegated power. The ninth is, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth is, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It is a striking evidence of the approval of the general scheme of the Constitution by those who most opposed its adoption that, in the mass of amendments proposed by the several state conventions, no fundamental change in the system was suggested.¹

These amendments are limitations of the federal power, and not in any sense limitations of the powers of the states.² The reason why they were thought to be unnecessary by the framers of the Constitution was that the United States was created to exercise delegated powers, and hence could have no powers not delegated. In other words, it was the agent of the people and of the states, and like every other agent could not have or exercise any power except such as was given by the principal. But an agent will sometimes assume more power than is actually given him, and the United States would be peculiarly tempted to such assumption, and therefore it was prudent to recite in its letter of agency that it did not have certain powers, and none at all beyond what were written. Experience has shown that the amendments are useful.

Since the late civil war three amendments have been adopted.

¹ The twelve amendments proposed were sneered at by a member of Congress as of "no more value than a pinch of snuff, since they went to secure rights never in danger." Another member characterized them as "whipped syllabub, frothy and full of wind, formed only to please the palate; or, like a tub thrown out to a whale, to secure the freight of the ship and its peaceful voyage."

² Barron *v.* Mayor of Baltimore, 7 Peters, 243; Eilenbecker *v.* Plymouth Co. 134 U. S. Rep. 31.

These amendments abolished slavery and all its incidents, and had for their further object the denial to the state of the power to do injustice to the citizen, and to confer upon the United States the power to secure to him justice and equality, if denied by the laws of the state.¹

Thus after an experience of three quarters of a century, it was ascertained that human rights and liberties are safer with a national guarantee than when exposed to the resentment of a state, or protected only by its sense of justice. These amendments secure citizenship and all its rights to the colored man, and all the benefits he can realize from them. The fourteenth amendment further provides that no state shall "deprive any person of life, liberty, or property, without due process of law," and thus vastly widens the power of the Union to prevent the states from doing wrong.

It was fortunate for the new government that its early development was in the hands of its friends. It was extremely fortunate that so good a man, and one who commanded such universal confidence as Washington, was the first President. It was fortunate that James Madison was in the first Congress. His practical wisdom in the preparation and advocacy of the wise and necessary laws enacted by that Congress confirms the title which his labors in the Constitutional Convention justly gave him, to be regarded as the first among the foremost of the founders of our constitutional government.

Washington appointed Alexander Hamilton Secretary of the Treasury, and Thomas Jefferson Secretary of State. Jefferson was then abroad in France, and did not return home until the following year. More than any other two men, Hamilton and Jefferson moulded the destiny of the republic. Hamilton stamped his impress upon the organization of the government; Jefferson upon the great party that was so long to control it. With perhaps some slight liberty of speech, it may be said of Hamilton and Jefferson that the former, during the twelve years of federal control, embracing the administrations of Washington and John Adams, caused the national edifice to be constructed according to the constitutional plans and specifications;

¹ Civil Rights Cases, 109 U. S. 3.

that then the latter entered into possession, and he and his political family after him, for sixty years, kept the edifice, with few changes and slight repairs.

✗ Hamilton believed in the necessity of a vigorous national system, organization, power, and order. The government should be so strong that disobedience would not enter the minds of the people. ✗Jefferson feared such a government as he would fear a tyrant. He would rather risk the anarchy of weakness than the tyranny of strength. Instead of controlling the people, it was better to persuade them to do right and then trust them to do it.

In the end the country had the benefit of both systems. Having Hamilton's first, it could risk Jefferson's afterwards. The country had the benefit of Hamilton's system of organization, and then of Jefferson's system of individual freedom. Our great national organization, extending from ocean to ocean, complete in its detail, but all springing from the official centre at Washington, is the development of Hamilton's ideal. Jefferson's theory of individual freedom and equality seems to have found its full realization in the three amendments which a later generation added to the national Constitution. Posterity used the methods of Hamilton to bring the theories of Jefferson into constitutional form.

Hamilton was then only thirty-two years of age, but Congress turned to him as the actual, as well as the official, master of the great problems of finance. He was competent to deal with them. The old confederacy had been a pauper, passing its hat around among the states, and receiving instead of the money it needed the contempt usually accorded to importunate indigency. The new Constitution gave to the new government the right to levy and collect the money it needed. Hamilton determined that it should not only have money in its purse, but that its resources of wealth and credit should be ample. In an exhaustive report to Congress, at the beginning of its second session, he unfolded these resources. He explained how the revenue should be raised, collected, and managed. He furnished estimates of income and expenditure, plans for the postal service, the sale of public lands, the regulation of the currency, commerce, and

navigation, the management of the treasury, and the system of keeping its accounts.

The system of Hamilton has been substantially the system of the nation ever since. He was right in his estimate of the value of money, and of the power of the nation to obtain it. "He smote," says Webster, "the rock of the national resources, and copious streams of wealth poured forth. He touched the dead corpse of public credit, and it stood erect with life." A few of Hamilton's concise sentences will show what results he expected to flow from a wise financial policy: "To justify or preserve the confidence of the most enlightened friends of good government; to promote the respectability of the American name; to answer the calls of justice; to restore landed property to its due value; to furnish new resources both to agriculture and commerce; to cement more closely the union of the states; to add to their security against foreign attack; to establish public order on the basis of an upright and liberal policy,—these are the great and invaluable ends to be secured by a proper and adequate provision, at the present period, for the support of the public credit."

While it was for Hamilton to propose these measures, it was for Congress to adopt, reject, or modify them. In the consideration of the financial measures of Hamilton, differences arose which began to mark the lines of division between the Federal and the Anti-Federal parties. Among Hamilton's measures was a scheme for funding, and ultimately paying, the debts which had been incurred both by the United States and by the states in prosecuting the war. ~~H~~Hamilton advised that the United States should assume all these debts. There was not much opposition to his plan with respect to the national debt, though many thought that the portion of it held by our own citizens should be paid only to the extent of its market value. The sixth article of the Constitution provides that "all debts contracted before the adoption of the Constitution shall be as valid against the United States under the Constitution as under the confederacy." The aggregate seemed enormous in that early day. Hamilton estimated that the foreign debt of the Union had reached the sum of \$11,710,378; the domestic debt

\$42,414,085 ; the state debts, incurred in the common cause, \$25,000,000. It was one of the great objects of the new Constitution to provide means for paying the national debt, held in part at home and in part abroad.¹ But there was no such constitutional provision respecting the state debts ; and why, it was asked, should the United States, struggling under its own acknowledged obligations, voluntarily assume this added burden ? Of these debts, some states had discharged more than others. Madison complained, not without reason, of the injustice of compelling those states which had borne their own burdens unaided to share in the obligations which the delinquent states had neglected. Massachusetts and South Carolina had contracted the largest state debts, — about \$4,000,000 each. North Carolina, Pennsylvania, Connecticut, Massachusetts, and South Carolina had contracted more than half of the whole state debts. The country was startled and cupidity aroused. Powerful combinations were formed in favor of the assumption of the state debts, yet none could be formed strong enough to carry the measure upon its merits.

* Hamilton and his friends, however, it was said, were anxious to carry the measure, not so much in the interests of public justice, as for the purpose of securing to the new government the support of this large body of creditors. It was readily seen that if the new government, with ample resources and credit, should assume these debts, so long delayed and depreciated by the states, the power and prestige of wealth would pass to its side. The new obligations would form a circulating medium greatly needed by the impoverished country.

Pending the consideration of the assumption of the state debts, the location of the new capital came up for consideration. The North wanted it on the Delaware or Susquehanna ; the South on the Potomac. Meantime Washington had appointed

¹ The domestic debts were regarded as practically worthless. They had been incurred in part upon the basis of continental money. This money was taken in payment of the subscriptions to the new national loan at the rate of one dollar in good money, for \$100 in continental money. Hence the phrase "not worth a continental." See *Briscoe v. Bank*, 11 Peters, U. S. Rep. 333, for a history of colonial paper money. The Continental Congress issued more than \$300,000,000. (Ib.)

Thomas Jefferson Secretary of State. He had been abroad as minister to France. The breaking out of the French Revolution detained him, and he did not enter upon his duties as secretary until March, 1790. By that time Hamilton's measures with respect to the continental debt had been adopted, but the assumption bill was pending. Jefferson himself gives a graphic account of the manner in which the capital and assumption bills came to be passed.¹

Both bills were carried. The bill for the assumption of the debts of states had, however, been modified by reducing the amount to about one half the sum proposed by Hamilton. But

¹ Jefferson writes : "The bill to assume the state debts was lost at first by a few votes ; the bill to locate the capital on the Potomac was also lost by about the same number of votes. The Eastern and Middle States were for the assumption ; the Southern States against it. The Southern States wanted the capital on the Potomac ; the other states on the Susquehanna. Both sections were greatly vexed at losing their favorite measure. At the last, the two measures were combined.

"The assumption bill produced the most bitter and angry contest ever known in Congress, before or since the union of the states. I arrived in the midst of it, but a stranger to the ground, a stranger to the actors in it, so long absent as to have lost all familiarity with it, and as yet unaware of its object. I took no concern in it. The great and trying question, however, was lost in the House of Representatives. So high were the feuds excited on this subject that on its rejection business was suspended. Congress met and adjourned from day to day without doing anything, the parties being too much out of temper to do business together. The eastern members threatened secession and dissolution. Hamilton was in despair. As I was going to the President's one day, I met him in the street. He walked me backwards and forwards before the President's door for half an hour. He painted pathetically the temper into which the legislature had been wrought ; the disgust of those who were called the creditor states ; the danger of secession of their members, and of the separation of the states. He observed that the members of the administration ought to act in concert ; that the President supported the measure, and that we ought to support him ; that it was probable that an appeal from me to some of my friends might effect a change in the vote, and the machine of government, now suspended, be again set in motion. I told him I was a stranger to the whole subject, but if he would dine with me the next day, I would invite a friend or two, and that I thought it impossible that reasonable men might not be willing to make some compromise to save the Union. We did dine together the next day, and talked the matter over, and came to the conclusion that to save the Union some of the members had better change their votes. But it was observed that to do this would be a bitter pill to the Southern States, and that some concomitant measure should be adopted to sweeten it a little to them. It was thought that by fixing the capital first at Philadelphia temporarily, and then permanently on the Potomac, this might as an anodyne calm in some degree the ferment. So to carry the assumption bill, White and Lee agreed to change their votes, and Hamilton agreed to get enough to carry the capital bill."

the struggle developed the division of parties on the lines of strict or liberal construction of the Constitution. Hamilton became the leader of the liberal constructionists ; this party appropriated the name of Federalists. In the Constitutional Convention, the term "Federalist" was applied to those who wanted to amend the Articles of Confederation ; they were in favor of a federal as distinguished from a national government. But when the struggle began over the adoption of the new Constitution, its friends appropriated the name to themselves, thus reversing its signification. Jefferson became the leader of the strict constructionists, and they were called Anti-Federalists.¹

It will be readily seen that the strict constructionists were state rights people. The more strictly the Constitution was construed, the less power was committed to the United States and the more retained by the states. Hamilton was disappointed by the failure of the framers of the Constitution to adopt as strong a system of government as he considered necessary. But he resolved to make the system which was adopted as strong as possible. He conceived that if the powers conferred were seized by a bold and firm hand, and pushed to their extreme limits by liberal construction and resolute advances, the system might be developed into a government sufficiently strong to accomplish the purposes of its creation. He was intensely practical and active, the master of organization and expedients, and always had the courage of his convictions. Jefferson was a theorist, a dreamer of dreams, a philanthropist, a philosopher, a doctrinaire, a man who studied, and thought, and reasoned. He meditated in his chair of state upon human rights and grave constitutional problems ; while Hamilton, with tireless industry and amazing activity, set in vigorous motion every power of the government which he could grasp. Jefferson had no capacity for executive action. There was not, in the beginning, in the Department of State, much for him to do ; but while Hamilton was busy with his work, Jefferson was slowly evolving his theories. They took the form of a protest against the broad assump-

¹ Jefferson afterwards said that in consenting to help carry the assumption bill he had been duped by Hamilton before he fully appreciated the significance of the measure.

tion of constitutional power asserted by Hamilton, and of a plea for the rights and liberties of the states and the people against the aggressions which he charged against the policy of Hamilton. In other words, he professed to be a Republican, the champion of the people, the foe of centralization of power in the general government. ~~X~~He believed, or affected to believe, that a strong central government would end in the overthrow of liberty, and the establishment of a monarchy. This danger must, he thought, be averted by confining the powers of the government strictly within its functions as limited and expressed in the Constitution.

His theories were greatly influenced by his sympathy and association with the French revolutionists. He had been in France five years. When he first went there, the monarchy, absolute in its powers, and unchallenged in its title, seemed to be among the firmest of all human institutions. Before he left, the king, who needed money, and did not know how else to get it, had summoned the States-general, for the first time after an interim of one hundred and fifty-six years. Every reader knows how the people, led by circumstances, rose in their unwonted use of power, and then, surprised to learn how strong they were, went on, step by step, until, in the intoxication and madness of strength and liberty, they crushed monarchy, king, nobility, clergy, and the more conservative friends of liberty itself, and made terror, for the while, supreme. Looking back across the century, we see that out of all this anarchy, crime, and horror, the cause of liberty and of the people gained. Thanks to the French Revolution, constitutional instead of absolute governments now rule a great part of the civilized world and must ultimately rule the whole. The ferment was active when Jefferson returned home. At Paris, his intimacy with Lafayette introduced him into the society of the Republicans. They naturally regarded him as an instructor, counselor, and friend, whose suggestions were valuable. His whole sympathies were with them. He went daily to Versailles to attend the National Assembly. He actually sketched the chief heads of a charter, which he suggested should be extorted from the king. He ~~X~~especially sympathized with the political maxim, "Let us alone."

If the government is for the people, let it keep its hands off the people; the less power in the government to put its hands on the people, the better. These doctrines led to the strictest construction of our Constitution, for the more its powers were cut down, the less the people were molested. He naturally became the apostle of the virtue and wisdom of the people. Possibly there was a vein of the demagogue in his composition. He was honest in his beliefs, though he may have resorted to the arts of the politician in order to make other people adopt them. At any rate, he flattered the people, and they rallied to his support. "Why should one man rule another?" he said. "Why should the government admit of such a possibility, beyond what is necessary for the common good? and why not guard the avenues of power with jealous care, lest cunning men, like Hamilton, crush our liberties under the plea of necessity?"

Jefferson acquired great reputation as the author of the Declaration of Independence. There does not seem to be any enunciation of new principles in that famous instrument. John Locke, in his treatise upon civil government, written in defense of the right of William and Mary to the throne of England, had announced the same doctrines, and had made them luminous by the light of his clear and comprehensive argument. Locke borrows from and credits much to Hooker, who wrote a century before. Voltaire and Jean Jacques Rousseau had said much the same things; and enforced and illustrated them by the wit and acuteness of their genius. John and Samuel Adams, James Otis, and Patrick Henry had made the principles familiar, in defense of the colonies against the aggressions of the crown. The colonies themselves had long avowed the same principles in their governments.¹

¹ Winthrop, governor of Massachusetts in 1650, one hundred and twenty-six years before the Declaration of Independence, said: "There is a twofold liberty, natural and civil. The first or natural liberty is common to man with beasts. Man hath liberty to do what he lists, evil or good. This liberty is inconsistent with authority; to maintain this liberty makes men grow more evil. All the ordinances of God are bent to restrain and subdue it. Civil liberty has reference to political covenants and constitutions amongst men. This liberty is the proper end and object of authority and cannot subsist without it; it is a liberty to do only that which is good, just, and honest. This liberty you are to stand for, with not only the hazard of your goods but of your lives if need be. Whatsoever

Jefferson, however, illustrated the fact that the man who can express in striking phrases the truths which fire so many hearts does the important work of enabling men to express what they feel. This may be said in favor of the Declaration : Men had uttered the same sentiments ; but great nations had not adopted them. His were words fitly spoken, and they became apples of gold in pictures of silver. Other writers had contended for the political liberties of the people ; but Jefferson emphasized their equality in rights as well as in liberties. The claims of the poor and the ignorant were embraced by his benevolence. All the people, and not the favored few, should take part in the control of the government, and thus keep in their own hands the means to protect themselves.

From the beginning of the century down to the outbreak of our civil war, Jefferson's theories were the accepted creed of a majority of our people. His influence still survives. The phrase "Jeffersonian democracy" is still current among us. It is thought to mean whatever is right and safe in the advance and defense of liberty, equality, and good government. We probably shall finally rank him as the truest friend and apostle of the masses of the people which our country has produced, notwithstanding the fact that his methods of action were weak and sometimes discreditable. He leveled the masses up and the classes down, and replaced aristocracy by democracy.

Washington brought Hamilton and Jefferson into his cabinet, believing them to be the ablest men for the places that the country afforded. But for immediate results, Hamilton was far the superior of Jefferson. His active, organizing, constructive mind won the confidence of Washington. Almost always when

crosseth this is not authority, but a distemper thereof." Witness also the Constitution of Connecticut formed in 1638, and the Code of Rhode Island of 1650. Indeed, the ancient democracies were governments by the people. In 1683 Algernon Sidney perished upon an English scaffold under condemnation for high treason. The main evidence against him was extracted from his private writings which the king's officers found in his closet. He had written in the privacy of his chamber that "The king is subject to the people that make him king ;" and that "God, having given to all men in some degree a capacity of judging what is good for themselves. He hath granted to all likewise a liberty of inventing such forms of government as please them best." The pen of Jefferson transcribed the treason of Sidney into the text of the Declaration.

Hamilton and Jefferson differed, Washington, after calmly weighing the arguments of each, followed the advice of Hamilton.¹

The great struggle, however, between the strict and liberal methods of constitutional construction began in earnest over Hamilton's proposal, made to Congress in December, 1790, to establish the Bank of the United States. At that time there were only three banks in the country and currency was scarce. Hamilton asserted that a bank would be a convenient fiscal agent, very helpful to the government in the management of its finances, especially in making payments, and in transmitting money from one part of the nation to the other ; and would also "provide for the general welfare" by affording a convenient currency, and in giving that accommodation to business men which experience had shown to be in a high degree useful and convenient. It was quickly objected that this was another measure to make the wealth of the country the ally of the government, and of the party which now began to regard Hamilton as its leader.

The constitutional objection was that to create a bank is to create a corporation, and the power to create either a bank or a corporation could not be found in the Constitution. The proposition was speedily deduced that in a government of delegated, enumerated powers, you must put your finger upon the clause of the Constitution which contains or specifies the power, otherwise you must admit that the power does not exist ; that if you cannot find the power expressed in the Constitution, then you must concede also that it is reserved to the states, unless the Constitution expressly denies the power to the states, which in this case is not done. Hence, it was argued, for the United States to exercise the power to create a bank or a corporation is not only to exercise a power not conferred upon the United States by the Constitution, but is to encroach upon the powers reserved to the states.

It was answered that the rule announced by the opponents of the bank, that unless you put your finger upon the words of the

¹ Jefferson records : " Hamilton and I were pitted against each other every day in the cabinet like two fighting cocks."

Constitution in terms conferring the power, the power does not exist, is fatally wrong ; that the Constitution is an instrument made for the purposes of a government ; that in order to carry on a government, whatever particular means are necessary in order to use the great powers delegated are as much within the terms of the Constitution as if expressly written therein ; that the Constitution does expressly enumerate such great powers as to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies ; and that after conferring these great powers it then confers in express language, “ the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” It is true that nothing is said in the Constitution about the creation of a bank or a corporation. But suppose a bank is a necessary and proper means to carry on any or all of the other enumerated powers, then Congress has the power by law to create a bank or corporation, as means to accomplish the great powers especially enumerated. We grant, they said, that Congress may not create a bank or corporation for the simple purpose of accommodating individuals, however useful to them such accommodation may be. But if a bank is useful as an agency to promote or render convenient the execution of the powers delegated to the United States, then as a means to the governmental end, the bank may be created within the implied powers of the Constitution. None of the powers conferred can be executed without the employment of means, and the Constitution does not descend to the minutiae of pointing out the precise methods to be employed, and therefore we cannot put our finger upon the words which detail them. Those who are intrusted with the duty of executing the powers must devise the means. Congress is charged with the power to prescribe by law the agencies to be employed to execute the powers conferred upon it ; and if it shall judge that the employment of a bank is appropriate, then it may provide for the creation of a bank, to the end that the agent may be at hand and subject to command.

To this part of the argument the opponents of the bank answered: "Grant that Congress may employ the means necessary to execute the great powers conferred, the Constitution has by express words, in the section quoted by our adversaries, limited those means to such as are both 'necessary and proper; ' and if we grant that a bank is proper, we do not grant that it is also *necessary*; the best that can be said for it is that it is simply convenient, and the Constitution does not allow it because convenient."

The friends of the bank replied to this by urging that the clause in question was intended to enlarge the powers already conferred, not to restrict them ; that it was found among the powers granted, not among the limitations upon such powers ; that the word "necessary" did not imply that the means to be used should be indispensable, as in another case where the word "necessary" was preceded by the word "absolutely;" that it was rather equivalent to "requisite," "needful," "conducive to;" and that in any event, Congress must be the judge of the degree of necessity, since the word plainly admitted of different degrees, and hence that the true construction was, as Chief Justice Marshall afterwards formulated it, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

This argument prevailed, and the bank was created, and the Federalists won the victory. It was a substantial victory, for it brought the support of a great moneyed institution to the new government, its creator. Twenty-five years afterwards the Supreme Court of the United States, in a suit against the bank brought by the state of Maryland, sustained the constitutionality of the bank, using a method of reasoning similar to that just presented.¹

In the triumph of the friends of the bank, the Anti-Federalists feared that a principle of constitutional construction was adopted that must inevitably lead to that extension of the federal power which would overthrow the rights of the states and the liberties of the people.

¹ *McCulloch v. State of Maryland*, 4 Wheaton, 421.

Jefferson said : "The object of all Hamilton's plans, taken together, is to draw all the powers of government into the hands of the general legislature ; to establish means for corrupting a sufficient corps in that legislature to divide the honest votes, and preponderate by their votes the scale which suited ; and to have the corps under the command of the Secretary of the Treasury for the purpose of subverting, step by step, the principles of the Constitution, which he has so often declared to be a thing of nothing, that must be changed." The opposition to the bank was very great in some of the states. Virginia by its legislature had already sent a memorial to Congress asking that both the assumption law and the funding law be repealed. It declared the assumption law to be a violation of the Constitution and pregnant with disaster to the government. This memorial drew from Hamilton the prophetic utterance : "This is the first symptom of a spirit which must either be killed, or which will kill the Constitution of the United States." The bank was a success, and a pillar of strength to the new government. The present national banks are its legitimate offspring. The constitutional controversies it evoked lasted until the civil war.

By the close of the first Congress the new nation had made long strides towards its permanent organization. Its financial policy had been developed ; its revenues were collected with certainty and regularity. They were sufficient for its expenditures, which were a marvel of cheapness when compared with those of the European governments, and they gave promise of the ultimate extinguishment of the national debt. The Executive Departments were organized and in systematic operation. The courts were discharging their functions. Two years of intelligent and patriotic work, with but slight hindrance from partisanship, had accomplished surprising results. Commerce had increased, new enterprises were undertaken, emigration was moving beyond the Ohio River and Alleghany Mountains. The post-office was rendering a welcome service. The notes of the new bank were current from Maine to Georgia. The new coin, bearing the arms of the United States, and not of any state, was in circulation, and testified most convincingly to a people

long accustomed to eke out a scanty currency of worn-out foreign coins and doubtful paper, with various commodities, that the new Union was the dawn of a better day.

Confidence in the new government had steadily grown. Rhode Island and North Carolina had finally ratified the new Constitution, and two new states, Vermont and Kentucky, had been admitted into the Union.¹ The era of prosperity seemed to have commenced. But the new order of government had evoked new interests, new causes of jealousy, and new animosities. The old order of vested political interests had been disturbed. Devotion to the new Union had been made the test of political action. The younger race of federal politicians were carrying everything before them in the states. The old political leaders who held aloof from the new order were pushed from their official seats, and Federalists sat in their places.

These changes begat animosities. The opposition party which had been forming in the first Congress was much more pronounced in the second, and was strengthened by the malcontents who found themselves pushed against the political wall. State and sectional jealousies had been excited. The strong hand which had been placed beneath the new government, its bold assumption of constructive powers, its alleged favoritism of moneyed interests, its imputed tendency towards aristocracy if not monarchy, afforded abundant occasion of fault-finding.² The anti-federal party came into being as a natural growth. It would soon seize and long retain the helm of government. It

¹ Thus was commenced the practice, long observed, of admitting a northern and southern state at the same time.

² "The adoption of the Constitution raised a singular ferment in the minds of men. Every one ill at ease in his finances, every one out of elbows in his circumstances; every ambitious man, every one desirous of a short cut to wealth and honors, cast their eyes on the new Constitution as the machine which could be wrought to their purposes, either in the funds of speculation it would afford, the offices it would create, or the jobs to be obtained under it. Not one of them has found a patron in me." . . . "The President has become in the hands of Hamilton the dishclout of every dirty speculation, as his name goes to wipe away blame and silence all murmuring." . . . "Everything, even to the naming of a committee, is prearranged by Hamilton and his group of speculators. I cannot find a single member to condole in sincerity with me over the political calamities of my country. Let me deliver myself from the society of such men, for I verily believe the sun never shone on a more abandoned composition of political characters." (Maclay's Journal, 1790, 321, 329, 331.)

would take on new names, divide into factions, and seem to disappear, but not for long; finally it would reappear, and under the name of Democracy pass from power with the administration of James Buchanan, and resume it with the administration of Grover Cleveland.¹

The second Congress was greatly distracted by dissensions. The contending parties were respectively inspired by Hamilton and Jefferson. Hamilton and his measures were the object of attack. The victory remained with Hamilton during this Congress, not so much in the new measures which he proposed, as in defeating the schemes which were devised to overthrow him.

An unsuccessful effort was made in this Congress to regulate commerce upon the basis of discriminating in duties upon imports according to the commercial advantages extended to us, or withheld from us, by foreign nations. Manifestly such a system was contemplated by the framers of the Constitution. But the European powers were involved in the war which the French Revolution provoked. Our sympathies were with the French, but our mercantile and commercial interests were largely dependent upon and controlled by British capital; and although bills for the purpose passed the House, they were rejected by the Senate. The charge was made that British influence was more powerful than American. Such a charge easily won belief among those who were controlled by their sympathies or prejudices.² It was partly true. But it was also

¹ Oliver Wolcott was auditor under Hamilton and succeeded him as Secretary of the Treasury. He was familiar with the views of the friends of the new government from the beginning. December 2, 1789, he wrote: "I cannot help considering all that is doing towards the establishment of government as an experiment of doubtful success." Again, September 14, 1790, "It will be several years before we shall know certainly whether the new constitution will answer the purpose." And February 12, 1791: "The indications of public sentiment with respect to the new government are very equivocal. The northern states and the commercial and moneyed people are zealously attached to it. The state executives and officers cannot be considered as good friends; many are designing enemies." And January 20, 1792: "The more the structure and powers of the present government are considered, the more certain it is that it is not calculated to bear much of a load; it rests upon the public approbation." (Gibbs's Administrations of Washington and Adams, pp. 24, 58, 62, 72.)

² "It is a doubt with many whether our present form of government continue many years. The jealousies which exist in the southern states respecting the funding system and most of the measures of consequence which have been adopted,

true that we had more to gain by preserving our established business relations with English traders, than by severing them and trying to establish new relations with a government and people so thoroughly unstable and demoralized as were the French in the early years of their revolutionary paroxysms.

American shipping was encouraged by a discount of ten per centum of the duties upon the goods imported by it, and by a tax rate which discriminated in its favor; but the system of discriminatory duties, in which imports from friendly foreign nations should be regulated upon the basis of reciprocal relaxation of imposts, has never been generally adopted.

The important question of the ability of the government to enforce an odious excise law was now challenged but successfully answered.

In 1791 a tax was imposed by Congress upon whiskey distilled in the United States. "Excise" was an unpleasant word to those whose memories went back to ante-revolution days. But the assumption of the state debts made it necessary to have recourse to this source of taxation. In western Pennsylvania, where whiskey was manufactured, the people resolved to resist the collection of the tax. A tax collector was tarred and feathered and robbed of his horse. Similar acts of violence were practiced upon other officers. Whoever attempted to support the officers in the collection of the tax exposed his life and property to danger. The administration did not feel strong enough at first to attempt by force the collection of the excise. Congress passed an act providing for calling out the militia, at the same time reducing the tax. But the amended law was no more favorably received than the original. The power of the United States to lay the tax, much more to collect it, was openly denied. The tax was characterized as a national halter upon the neck of the states. The whiskey patriots opened correspondence with numerous malcontents throughout the Union.

added to some strange and fantastical notions about liberty which they entertain approaching nearly to French extravagance of liberty and equality absolute, render the continuance of our Union for many years, even of peace, doubtful. But should a war take place, I think we have scarcely ground to hope a continuance of the Union." (Letter of Joseph Coit, a representative in Congress from Connecticut, April 22, 1794, quoted in Gilman's Monroe, p. 43.)

Jefferson sympathized with the disturbers, partly because he thought their complaints were just, and partly because he could rejoice in the defeat of Hamilton.¹ Hamilton wanted the revenue which the excise would yield; he wanted to seize this valuable field of revenue before the states should occupy it. Now that the collection was opposed, and leading Anti-Federalists sympathized with the opposition, he advised the President to call out 15,000 militia, and the President issued the call. Hamilton feared that the militia would not respond, but they did, and the crisis was safely passed. The militia of Pennsylvania turned out largely through the influence of the governor of that state, who overcame their disaffection more by his persuasive oratory than by his authority. The suppression of this insurrection was stigmatized as the triumph of federal despotism. If, as was feared, the troops had refused to obey, the government might have fallen into such contempt that its dissolution could not have been averted. But fortunately the national authority was obeyed, and its power compelled respect.

General Wayne's victory over the northwestern Indians, whose hostility it was believed had been stimulated by British influence, was a national triumph in which all parties could rejoice. It was won in 1794, and was followed by a treaty of peace, which was long observed.

Under Washington's first administration the new government had made an auspicious beginning. Thenceforth, however it might totter and stumble, it would not fall. Here the people respected and obeyed the law, and prosperity abounded. In France at the same time the Reign of Terror was the fruit of the attempt of the people to govern themselves. Here free institutions were a natural growth; there they were exotics. A republic, to be successful, must have had a past.

¹ "The excise law is an infernal one." (Jefferson to Madison, December 28, 1794.)

CHAPTER IX.

THE PASSAGE OF THE NATION THROUGH PERILS.—TROUBLES WITH FRANCE AND ENGLAND.—ALIEN AND SEDITION LAWS.—VIRGINIA AND KENTUCKY RESOLUTIONS.—DOWNFALL OF THE FEDERAL PARTY.—JEFFERSONIAN ERA OF STRICT CONSTRUCTION.—FEARS OF MONARCHY.—OF DISSOLUTION.—FRENCH AND ENGLISH OUTRAGES.—WAR WITH ENGLAND.—PEACE.—HARTFORD CONVENTION.—ERA OF GOOD FEELING.—INTERNAL IMPROVEMENTS.—MONROE DOCTRINE.

WASHINGTON retained the confidence of his countrymen and was unanimously reëlected. For the twenty-two years commencing with his second administration, and closing with the peace of 1815, our country was kept in turmoil by England and France. Sometimes war threatened us with England and sometimes with France, and it was a happy season when we were not in trouble with both at the same time. We tried hard to preserve friendly relations with both and to avoid giving offense to either; but in their efforts to destroy each other they were too eager and too jealous to be just. We would have been content with a very moderate share of fair treatment, and no doubt if we had been in a condition to do it, we would have declared war against both. Our own government seemed to be growing in strength; Hamilton's organizations and measures were operating well. But in our foreign relations we were obliged to take counsel of our weakness. The nation staggered along amidst perils foreign and domestic until 1815, when suddenly peace with England dispelled all dangers; the "era of good feeling" succeeded, and our people vied with one another in devotion to the Union.

Our sympathies were naturally with the French. In our struggle with Great Britain, the French monarchy had sent us troops, lent us money, and made our cause its own. The help was important, and was given when sorely needed. True, it was the French monarchy and not the republic that helped us; a

monarchy which utterly repudiated both in theory and practice the idea that the people bore any relation to government, except as subjects, bound to implicit obedience. The motive in lending us aid was to injure England by depriving her of her American colonies,—colonies which France once had hoped to call her own. But whatever the motive, the United States reaped the benefit, and the gratitude of our people was great. We rejoiced to see the French, after centuries of oppression, so boldly, and apparently so successfully, follow our example in striking for their liberties. When they confirmed their republic by executing their king, we could not quite approve the means, but we were ready to pardon much to the spirit of liberty.

War was declared between England and France in 1793. France appealed to us for such help as we could give. Hating England and loving France, hating despotism and loving freedom, our hearts were with the latter. Moreover, during our Revolution, in the very crisis of our peril, we had made a treaty with the king of France, in which each power had agreed to help the other in her war against her enemy. This treaty gave privileges to France and denied them to England; to adhere to it would make us the ally of France and the enemy of England. Washington pondered long over the situation; it was critical. Why should we, in our feeble condition, when we had just achieved a favorable start upon our national career, endanger all by our sentimental interference in European affairs? Hamilton studied the treaty, and found that its language described it to be a "defensive alliance" between us and France. His quick mind clearly distinguished between a defensive alliance and an aggressive one. Although France had at first taken up arms to repel aggression and invasion, she now entered upon aggressive war, and declared it to be her purpose to overthrow monarchies, and carry the blessings of freedom to the nations of the earth. Washington adopted the distinction suggested by Hamilton, and issued a proclamation of neutrality, to the disgust of Jefferson, who affected to despise such a quibble. This proclamation greatly incensed that portion of our people whose commercial interests did not incline them to favor England. The French republic sent her minister, Genet, to this

country. England had not yet sent any minister here. Washington was willing to receive Genet, but the latter attempted to stir up the country against the administration before he presented his credentials. He landed at Charleston, South Carolina, and was received there, and everywhere he went, with transports of enthusiasm. He brought with him three hundred blank commissions, to be distributed to such persons as should fit out cruisers in our ports to prey upon English and Spanish commerce, and seize the Spanish territories of Florida and Louisiana. He opened stations for the enlistment of American sailors, established consulate courts to try and condemn the prizes taken by French privateers, and, in short, attempted to organize this nation into an active belligerent against England. For a while he seemed to be so far supported by the enthusiasm of the people as to threaten the supremacy of Washington's government.¹

Washington was firm in the course he had resolved to take ; he forbade Genet's acts, did what he could to counteract them, and finally procured his recall.

Under the influence of Genet, political clubs were formed throughout the country upon the model of the Jacobin clubs, which at that time were practically dominant over the French government. His idea was that they would overawe the administration here, as they did the legislative assembly, then the ruling power in France. These clubs were called republican clubs. The Federalists stigmatized them as democratic clubs, and their members as Democrats. The term "Democracy" in that day was a word of reproach, signifying a disorderly, riotous, and ignorant mob. It has a better meaning now. It is part of the legacy of the French Revolution.

The excesses of the French Revolution finally caused a re-

¹ John Adams, then Vice-President, afterwards wrote : " You certainly never felt the terrorism excited by Genet in 1793, when ten thousand people in the streets of Philadelphia day after day threatened to drag Washington out of his house and effect a revolution in the government, or else compel it to declare war in favor of the French Revolution, and against England. The coolest and firmest minds even among the Quakers in Philadelphia have given their opinions to me that nothing but the yellow fever, which removed Dr. Hutchinson and Jonathan D. Seargeant (the ringleaders) from the world, could have saved the United States from a fatal revolution in government."

action in feeling among our people, and Washington was applauded for his wisdom and firmness.

But the sympathy which our government withheld from the French did not keep us out of difficulty with England. Both England and the United States claimed that the provisions of the treaty of 1783 had not been observed. England accused us of not paying our debts to her merchants, an accusation largely well-founded. Hence she retained her military posts upon our northern frontier. We complained of this act of hostility. We complained still more of her hostility to our merchant marine. France forced her able-bodied men into her armies, and did not leave enough to cultivate her fields. Her armies and people could scarcely get food to eat, certainly not enough. Our merchant ships sought to carry them provisions, humanity and profit conspiring. England contended that starvation was an effective means of war, and that our breadstuffs, in transport to her enemy, were contraband of war and lawful prize. She captured many of these ships, and impressed into her service many an American sailor. Washington's policy was peace if possible. Though he had reason to fear that England would not treat with us, he sent there Chief Justice Jay, who succeeded in negotiating a treaty. This is famous as "Jay's Treaty." It was not much in our favor; it was liberal to England and inimical to the French, and our people were again greatly exasperated. Among other things it provided that our debts to English merchants should be paid, and our supplies of bread to the French should stop. The Anti-Federalists resisted the ratification of the treaty with the utmost desperation. But it was ratified. An appropriation was needed to carry out the provisions of the treaty, and the bill for this had to originate in the House of Representatives. The enemies of the treaty sought to defeat the appropriation. It was urged in its support that Congress had no constitutional right to refuse the appropriation, since the treaty was declared by the Constitution to be the supreme law of the land. After a long and bitter discussion, Congress made the necessary appropriation.

The constitutional question thus raised was long a vexed one, but the rule is now settled, that if it is necessary for Con-

gress to pass any law in order to carry a treaty into effect, Congress has the constitutional right to refuse to pass the law, and may thus defeat or break the treaty. The reason is, that by the Constitution both a treaty made and a law passed in pursuance of the powers conferred by the Constitution are equally the supreme law, and where the two conflict, the later supreme law prevails. A treaty thus supersedes an earlier law in conflict with it, and a later conflicting law supersedes or breaks the earlier treaty. If Congress fails to pass the law which the treaty requires, the treaty is defeated or broken.¹

Now the French in their turn were exasperated. They retaliated by making capture of our ships. We made some reprisals. Our treaty relations were declared to be at an end. We could come to no understanding, nor make any new treaty with France, so long as the French Directory, the executive power of France, held sway. This Directory remained in power from 1795 until Napoleon captured the government and became First Consul in December, 1799.

Meanwhile Washington retired, and John Adams, the successful candidate of the federalist party, became President. Adams was the revolutionary patriot and leader, a learned, good, and great man, despite an unfortunate mixture in his greatness of vanity, irritability, and proneness to jealousy. The conduct of the Directory was evasive, misleading, and mercenary. In 1797 Adams sent three envoys to France to negotiate a treaty. They were unofficially informed that the Directory would not negotiate with them unless first presented with a large sum of money. "Millions for defense, but not one cent for tribute," was the indignant response of the nation. War seemed inevitable, and the federal party was anxious for it. But the President was anxious for peace, and ruptured his party and lost his re-election by his efforts to preserve it.

When Napoleon came into power a treaty was made. This treaty among other things left our claims for French spoliations to be provided for by ourselves. In 1805 Congress passed an act for determining the validity and amount of such claims as should be presented; under the act many claims have been

¹ *Whitney v. Robertson*, 124 U. S. 190.

adjusted and paid. Jay's treaty with England did not protect us against her impressment of our seamen.

The outrages which we suffered from the injustice of England and France gave additional bitterness to the strife between parties at home. The anti-federal press was immoderate in its assaults upon the administration. It so happened that several of the anti-federal papers were conducted by foreigners. There were many foreigners in the country whose sympathies were with the French, and their hostility to the administration was open and passionate. The federal leaders determined to crush them out by the strong arm of the law. Hence the famous "alien and sedition laws" were passed. The remedy devised was worse than the disease. It hastened the federal party to its tomb, and was the occasion of the formulation of that unfortunate creed of constitutional construction and of state sovereignty known as the "Virginia and Kentucky Resolutions" of 1798-99.¹

By one of the alien acts the President was authorized to cause the banishment of aliens suspected by him to be dangerous to the peace and safety of the United States. Such an act in time of peace is of the very essence of despotism and arbitrary power. Hamilton, who now was out of office, in vain exclaimed against it. The sedition act authorized punishment of the authors of false, scandalous, and malicious writings and speeches against the government, made with the intent to stir up sedition. This act, unlike the alien act, did not dispense with the usual forms of trial, but it manifestly was intended to abridge the freedom of speech and of the press, and was therefore a violation of the spirit of the first amendment of the Constitution. Besides, the Constitution conferred no power to punish common law offenses, to which class the opponents of the administration contended that these utterances belonged. To the credit of the President, he never exercised any of the arbitrary powers vested in him by the alien bill.²

But the courts held that the government had the right to

¹ See *post*, p. 154.

² "This law was never executed by me in any instance." (Adams to Jefferson, June 14, 1813.)

protect itself against violence, and to that end against that abuse of the liberty of speech and of the press which incites to violence. The prosecutions under the sedition act were numerous. Some were ridiculous, and most were grossly oppressive.¹

Jefferson was the acknowledged leader of the Anti-Federalists, now self-styled the Republican party.² He was quick to see that the federal leaders had made a mistake, and was prompt to use that mistake to their downfall. His idea was to over-

¹ President Adams, on his return from the seat of government in 1799, passed through Newark, N. J. Some cannon were fired in compliment to him as he passed through the village. An Anti-Federalist, by the name of Baldwin, was heard to remark that he wished the wadding from the cannon had hit the President in his backsides. For this speech he was condemned to pay a fine of a hundred dollars.

One Judge Peck of Otsego, in the state of New York, circulated a petition asking the repeal of the alien and sedition laws. He was indicted in the city of New York for this alleged offense, and taken from his home to New York for trial, but he was never tried. His forced carriage to New York was the occasion of great excitement, and Federalism was held up to public execration. Matthew Lyon of Vermont, a member of Congress, and a candidate for reëlection, in a published address charged the President with "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." For this offense he paid a fine of one thousand dollars, and lay four months in jail. He passed from the jail to his seat in Congress; the Federalists made an attempt to expel him, because branded with a conviction for sedition, but the necessary two thirds could not be secured. In 1840 Congress refunded to Lyon's heirs the amount of the fine with interest. Other prosecutions for sedition were only a little less flagrant.

² Jefferson in his letter to Gerry of January 26, 1799, sets forth his platform thus: —

An inviolable preservation of the Constitution in the sense in which its friends advocated its adoption.

Opposition to monarchizing its features by the forms of administration which look to a transition to a President and Senate for life, and a hereditary tenure of those offices.

Preserving to the states all their powers, not yielded to the Union.

Preserving to the legislation of the Union its constitutional share in the division of powers.

Opposition to transferring powers of the states to the general government, and then the executive branch seizing them.

Vigorous, frugal, and simple government. Payment of debt. No multiplication of federal officers and salaries. No devices to perpetuate national debt.

Trust to militia for internal defense until actual invasion. No standing army in time of peace. No navy to increase our burdens, and to multiply occasions for war. Free commerce with all nations. Political connection with none. Freedom of religion. No legal ascendancy of one sect over another. Freedom of the press. Encouragement of science and no suppression of it in the name of religion. My own country first.

whelm the federal government and leaders by a sharp, sudden, and peremptory command of halt, from the states, which in his creed were the equals, and in effect the masters, of the general government. Without allowing his agency to be disclosed, he procured resolutions denouncing the alien and sedition laws as unconstitutional and dangerous usurpations of power to be adopted by the legislatures of Virginia and Kentucky.¹ Madison stood sponsor for the Virginia Resolutions. These resolutions threatened in an undefined way the interposition of the state to arrest the evils of the unconstitutional legislation of the federal Congress. The important one is as follows: —

“ This assembly doth explicitly and peremptorily declare that it views the powers of the federal government as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no farther valid than they are authorized by the grants enumerated in that compact, and that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.”

The Kentucky Resolutions were not toned down by the cautious hand of Madison, but retained the form which Jefferson gave them. The principal one reads: —

“ *Resolved*, That the several states comprising the United States of America are not united on the principle of unlimited submission to their general government, but that by *compact* under the style and title of a Constitution for the United States, and amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each state to itself the residuary mass of

¹ “ I enclose you copy of the draught of the Kentucky resolutions. I think we should distinctly affirm all the important principles they contain, so as to hold to that ground in the future, and leave the matter in such a train as that we may not be committed absolutely to push matters to extremities, and yet may be free to push as far as events will render prudent.” (Jefferson to Madison, November 17, 1798, Jefferson's Works, vol. iv. p. 258.)

their right to their own self-government, and that whenever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force ; that to this compact each state acceded *as a state*, and is an integral party ; that this government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself ; since that would have made *its* discretion, and *not* the Constitution, the measure of its powers ; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress."

Under this resolution the state might not only interpose, but be the judge of the mode and measure of redress. This resolution was the text of the secession and nullification doctrine of after years. Jefferson hoped that other states would unite in the same declaration, but they refused.¹

Armed resistance to the federal measures was no doubt contemplated by Virginia. This state went so far as to cause an armory to be built at Richmond, in order to be ready to make good, in whatever way should appear practicable, her demands upon the federal government.²

It is probably a fair inference to be drawn from the action of Mr. Jefferson that he then gravely doubted whether, in the light of his construction of the tendencies and purposes of the federal party and government, the new experiment of a national government was, if it could not be corrected, worth continuing.³

¹ The Assembly of the state of New York responded by a resolution adopted February 16, 1799, as follows :—

"Resolved, That as the right of deciding on the constitutionality of laws passed by the Congress of the United States doth pertain to the judiciary department of the government, this house doth accordingly disclaim the power assumed in and by the communicated resolutions of the respective legislatures of Virginia and Kentucky, questioning the expediency or constitutionality of the several acts of Congress in them referred to." Similar responses were made by most of the other states.

² John Randolph said in the House of Representatives in 1817: "There was no longer any cause for concealing the fact that the great armory at Richmond was built to enable the state of Virginia to resist by force the encroachments of the then administration upon her indisputable rights, upon the plainest and clearest provisions of the Constitution, in case they should persevere in their outrageous proceedings." (Van Holst's Const. Hist., vol. i. p. 158.)

³ "In place of the noble love of liberty and republican government which car-

We do know that he meant to hurl the federal party from power, and thus correct the tendency of the government, if possible ; he probably never fully settled in his own mind what specific course he would advise, if, after all, the federal party could not be overthrown by peaceful agencies. In considering the Virginia and Kentucky Resolutions, we should not hold Jefferson responsible for the use to which they were put long after he was in his grave. They helped to serve the purpose of their day and time. Jefferson was elected President. He called his election a revolution. He said "the Constitution was saved at its last gasp."

In the election of 1800, Jefferson and Burr were the candidates of the anti-federal party, and Adams and Charles C. Pinckney of the Federalists. As the Constitution then was, the candidate receiving the highest number of votes became President, and the candidate receiving the next highest Vice-President. Jefferson and Burr received a majority over Adams and Pinckney, but themselves received an equal number, and the choice of President and Vice-President devolved upon the House of Representatives. The Anti-Federalists had intended that Jefferson should be President, and Burr Vice-President, but such was the hatred of the Federalists toward Jefferson that many of them determined that Burr should be elected President, if possible. Thirty-five ballottings were had without result. On the thirty-sixth ballot Jefferson was elected.¹

ried us triumphantly through the war, an Anglican monarchical and aristocratic party has sprung up, whose avowed object is to draw over us the substance, as they have already done the forms, of the British government. The main body of our citizens, however, remain true to their republican principles. . . . Against us are the executive, the judiciary, two out of three branches of the legislature, all the officers of the government, all who want to be officers, all timid men who prefer the calm of despotism to the boisterous sea of liberty, British merchants, and Americans trading on British capital, speculators, and holders in the banks and public funds, a contrivance invented for the purposes of corruption, and for assimilating us in all things to the rotten as well as the sound parts of the British model. . . . In short, we are likely to preserve the liberty we have obtained only by unremitting labors and perils. But we shall preserve it." (Jefferson to Mazzei, April, 1796.)

¹ This result was due to Hamilton. His influence with the Federalists was great. He said : "If there is a man in the world I ought to hate, it is Jefferson, but the public good must be paramount to every private consideration." He said that Burr was bad morally and politically, and unfit to be trusted with the presidency. This act of patriotic fidelity to his country ultimately cost him his life.

This election led to the amendment of the Constitution to the effect that the electors should designate by their votes one person for President and another for Vice-President. This amendment, though not intended to change the original scheme of the Constitution, did materially change it. Under the original plan one candidate would be taken from the North and the other from the South; thus both sections had an equal chance to secure the President. As it could not be known which one would be chosen, there was less reason to look in advance to either for the favors of office, and hence less reason for the partisan contests which have occurred under the present system.

Jefferson's administration lasted eight years. His great act—greater by far in its results than he could imagine—was the Louisiana purchase. With that exception, and the repeal of an act of the late administration under which a large number of federal courts was established and federal judges appointed, and an unsuccessful attack upon the Supreme Court,—begun by the impeachment of Judge Chase, and ended by his acquittal,—his administration proceeded upon the basis that the Union should do as little as possible, and as much be left to be done by the states as possible. He found the various departments of the government in orderly operation, and with the exception of the new judicial department, he allowed them to continue. He could not safely do otherwise, and thus he seemed to adopt the methods he had so violently opposed. He was devoted to the Union in the limited sphere of the duties which he conceived to be delegated to it by the Constitution, and he served it according to his convictions of duty. He was a man of peace, and had no capacity for war. Both France and England gave him cause for war, but war he would not have, and his expedients to avoid it were exasperating to the commercial and shipping interests.

The Louisiana purchase is sufficiently important to justify some detail. In 1763, at the close of the Seven Years' War in Europe, and of the French and Indian War in America, by the treaty of Paris, France was stripped of her American possessions. She ceded Louisiana to Spain, and Spain ceded Florida to England. At the close of the Revolutionary War in 1783, England retroceded Florida to Spain. Thus Spain held Florida

and all the territory west of the Mississippi, the then unknown Oregon probably excepted. Her dominions, reaching from the Canadian frontier to the Gulf of Mexico, included the territory lying upon the gulf, and extending southward, embraced nearly all the lands between the two oceans north of Cape Horn. The territory between the Alleghany Mountains and the Mississippi River was occupied by colonists who had migrated from the states east of the mountains. The Mississippi was the natural outlet for their exports. Spain held the mouth of the river, and interdicted American commerce. In 1798 she transferred to the United States a post upon the river for the protection of her commerce and the deposit of goods. France was at war with England and wished the United States to become her ally. To accomplish this, she hoped by repossessing herself of Louisiana, and by closing the Mississippi, and by promising to reopen it, to tempt the United States to fight England. In 1800 Napoleon was First Consul of France, and Spain being practically within his power, she agreed to retrocede Louisiana to France by the secret treaty of San Ildefonso, in consideration of a new kingdom of Tuscany which Napoleon agreed to construct out of Italian territory and confer upon the Duke of Parma, son-in-law of the Spanish king. In 1801 peace was declared between France and England. Spain remained in possession of Louisiana, but Napoleon intended to renew the war. Spain, acting under Napoleon's instructions, in 1802 closed the river to the commerce of the United States. A rumor of the secret treaty of San Ildefonso reached President Jefferson, and through Mr. Livingston, our minister at Paris, he commenced negotiations for the opening of the Mississippi, and the purchase of a small parcel of land for the deposit and protection of our merchandise. Meantime a rebellion in the French island of San Domingo broke out, which consumed hosts of the very troops that Napoleon wished to send to Louisiana to prevent its capture by England upon the renewal of the war. In this emergency he concluded to sell the whole territory rather than risk losing it. Moreover, he feared if England should capture it, she would transfer it to the United States in order to secure our alliance with her against France. To the

surprise of Livingston, Napoleon made the offer to sell the whole of it for \$15,000,000, an offer which was eagerly accepted.

Spain immediately protested that France had sold what she did not own, since she had not paid the consideration agreed upon; but the renewal of the war in Europe and the speedy occupation of the territory by the United States disabled Spain from making her protest effective.¹

The Federalists never ceased to exclaim against Jefferson's alleged violation of the Constitution, and they affected to consider it the baser wrong, since he was professedly so strict a constructionist. The argument in support of the alleged unconstitutionality of the purchase was: The Constitution is silent upon the subject of the acquisition of territory, and therefore the power does not exist. The modern opinion is that the argument is unsound; that the power to make treaties, and the power of Congress to provide, if necessary, the purchase money, both uniting in the act of purchase, bring it within constitutional competency. The acquisition of the Louisiana territory opened the navigation of the Mississippi, prevented the secession of the vast territory within its eastern water-shed, and the rise of a rival power west of the river. Hamilton was wise enough to foresee the immense advantage of the purchase, but the federal party was not.

The Jay treaty expired in 1804. France and England were still at war with each other, and the usual outrages upon our commerce and upon our seamen continued. France wanted our breadstuffs, and the high prices tempted our traders to supply them. England had nearly driven the French from the seas, and to starve the people into subjection was part of her policy. In 1806 and 1807 she declared the French ports blockaded. The French retaliated by declaring the English ports blockaded, and also all the ports of the powers allied with England against

¹ "How do you view Louisiana? Is it not odd that we who have Millions of Acres of uncultivated Land to Let should become purchasers of additional Millions and at no small price if I am well informed? Is it not a little too near a resemblance to Morris's Speculations? and when we have paid the purchase money it is at last but a paper Contract which in the Eyes of a Man with a long sword, is not very binding. I regard the Deed of Sale from such a Man as not worth a Rush." (Jonathan Trumbull, Governor of Connecticut, 1803.)

France. The result was, the American ships were in danger of capture, no matter to what European port they sailed. Jefferson in vain remonstrated against this injustice. The American trade was principally carried on by the Northern States. France had so little naval strength that the northern traders saw that the best policy for them to pursue was to disregard the French blockade of the English ports, and carry on trade as usual with England, and thus induce her to relax her blockade of the French ports in our favor. Besides, the Americans could have made reprisals upon France, which would have conciliated the English. But the northern traders were mostly Federalists, and were therefore suspected of being friendly to England and hostile to France, while Jefferson hated England and loved France.

Jefferson concluded to recommend an embargo on all American shipping until one or both of the belligerents should suspend their obnoxious blockades. At this time Spain was an ally of France. She disputed our boundaries, menaced our frontier, and denied our right to the possession of Mobile. She, too, joined in the spoliation of our commerce. The embargo recommended by Jefferson was authorized by Congress, and the result was that English and French ships could not enter our ports, and our own ships could not leave them. Practically this did not much affect England. She sent her goods into this country through the Canadian ports. What American goods were exported went out through Canada, or in violation of the embargo. New England ships began to rot in their ports, and New England people began to turn their attention to manufactures. After fourteen months of experience under the embargo, Congress repealed the act and substituted the non-intercourse act. This act allowed trade with some foreign countries, but forbade it with England and France. This only partly relieved the distress, and did not satisfy the New England shippers. The Federalists now unearthed the Virginia and Kentucky Resolutions, and denied the right of the nation to adopt either embargo or non-intercourse measures.

An embargo is a protection to your own ships until you can get ready to fight. You order them into port lest the enemy

capture them before you can otherwise protect them.¹ But Jefferson ordered them into port and did not get ready to defend them, and Madison followed his example. Their idea was, that if France and England could not trade in our ports, they would come to reason. It was a mistake. It practically left England to do the trading for the whole earth. We lost trade, time, ships, and revenue.

While history recognizes the invaluable service which the federal party rendered the nation during the administrations of Washington and the elder Adams, it must admit that the accession of Jefferson was timely and fortunate. The Federalists met the opportunity and demands of the early formative age of the republic. Washington and Adams seized the infant government with resolute hands, and infused into it the vigor and force of their strong natures. Washington, especially, found in the Constitution as expounded by the genius of Hamilton the warrant for all necessary power. Hamilton was not the adviser of Adams. Adams was jealous of Hamilton's leadership and influence; and Hamilton, though he respected the integrity and ability of Adams, could not conceal his contempt for the whimsical bitterness which flecked the real greatness of the grand leader of the revolutionary patriots. The advisers of Adams expanded the constitutional powers of the government far beyond the limits which Hamilton advised. "Where," said Jefferson in a tone of alarm, which we may believe was sincere, "does all this tend, if not to overthrow the republic and establish a monarchy?" He designated the Federalists as "Monarchs." He feared, or affected to fear, the gradual development of the government into an anti-republican power.

By the Constitution "the executive power" is vested in the President. In the case of legislative power the words are, "All legislative powers *herein* granted," but the grant of executive power is not thus qualified. The President is commander-in-chief of the army and navy. He makes treaties by and with the advice and consent of the Senate, and appoints ambassa-

¹ "The embargo, keeping home our vessels, cargoes, and seamen, saves us the necessity of making their capture the cause of immediate war." (Jefferson to John Taylor, Jefferson's Works, vol. v. p. 227.)

dors, ministers, judges, and other high functionaries. With an obedient and submissive Congress, what might not an ambitious and unscrupulous President dare to do? He has the undefined power to take care that the laws shall be faithfully executed. The alien and sedition laws were samples of the laws, and the prosecutions under the sedition laws showed what might be done in executing them. With our century of experience, we regard these powers in the light of the prudent way in which they are usually exercised, but Jefferson and his party did not enjoy such a satisfactory light. They had seen a President send an army into Pennsylvania to suppress an uprising against an odious excise tax. They saw a great national bank wielding the moneyed power of the nation, and the nation itself in the possession of an imperial revenue. They saw the nation hostile to republican France, and friendly to monarchical England. They saw that the government was stronger than the people and prompt to suppress liberty of speech and of the press, unless attuned to its praises. They saw in the administrations of Washington and Adams a pomp and ceremony that took on some of the forms of imperial courts. True it was that the country was prosperous, that the government had brought in order; and honor, and stability; had settled disputes with foreign powers and with Indian tribes; had regulated commerce; had counteracted every effort to break up the new Union; and had placed the governmental machinery in admirable working order. But they felt that in proportion to the growth of the nation there was a decrease in the power and rights of the states and of the people.

Under the lead of Jefferson the people rose and placed him in power. He himself subsequently wrote, "The contests of that day were contests of principle between the advocates of republican and those of kingly power."¹

¹ Hamilton wrote in 1792: "I myself am affectionately attached to the republican theory and desire to demonstrate its practical success. But as to state governments, if they can be circumscribed consistently with preserving the nation, it is well; and if all states were of the size of Connecticut, Maryland, or New Jersey, all would be right. But as it is, I seriously apprehend that the United States will not be able to maintain itself against their influence. Hence I am disposed for a liberal construction of the powers of the general government."

It should be borne in mind that the Federalists in power were charged with responsibility under new and possibly dangerous conditions; that they were men of ability and had the courage of their convictions; they felt the need of the new government for nerve, money, and power, and they contributed these to the best of their ability. They despised their political enemies as malcontent agitators, lacking patriotism, courage, and sincerity, and they treated them as mischief-makers, fit only to be suppressed.

That the Anti-Federalists really believed that the Federalists entertained the purposes they imputed to them, we are assured by President Monroe. In 1817 he wrote to Andrew Jackson:

"That some of the leaders of the federal party entertained principles unfriendly to our system of government, I have been thoroughly convinced; that they meant to work a change in it by taking advantage of favorable circumstances, I am equally satisfied. It happened that I was a member of Congress under the confederation just before the change made by the adoption of the present Constitution, and afterwards of the Senate, beginning shortly after its adoption. In these stations I saw indications of the kind suggested. . . . No daring attempt was ever made because there was no opportunity for it. I thought that Washington was opposed to their schemes, and not being able to take him with them, that they were forced to work, in regard to him, underhanded, using his name and standing with the nation, as far as circumstances permitted, to serve their purposes. The opposition, which was carried on with great firmness, checked the career of this party and kept it within moderate limits. Many of the circumstances on which my opinion is based took place in debate and in society, and therefore find no place in any public document; I am satisfied, however, that sufficient proof exists, founded on facts and opinions of distinguished individuals, which became public, to justify that which I had formed. My candid opinion is that the dangerous purposes to which I have adverted were never adopted, if they were known, especially in their full extent, by any large portion of the federal party, but were confined to certain leaders, and principally to the eastward."

Washington, however, said he did not think that there were at any time a dozen well-informed men in the country who wished a monarchy to be established.

When the Union was in its infancy, it was a question whether it would continue to hold together under the practical working of the Constitution. The idea of disunion was familiar to all, and to threaten or predict it was the readiest solace of disappointed ambition. But such threats and predictions were the vaporings of discontent. There was no sufficient reason for disunion, and hence no basis to organize against the Union. No union of disaffected states could be formed strong enough to stand against a foreign power, or against the remaining states. There was much grumbling, but mere words are not the overt acts which the Constitution makes evidence of treason, and the grumbler discreetly refrained from affording the government the evidence upon which to convict them, even of sedition.

During the administrations of Washington and John Adams a few of the leading Anti-Federalists threatened disunion. During the administrations of Jefferson and Madison a few of the leading Federalists threatened it. The Virginia and Kentucky Resolutions of the Anti-Federalists were dangerous opinions, but not treason; the Virginia armory was presumably for the use of the state militia. The federalist opposition in New England to the embargo and non-intercourse laws, the resolutions of the Hartford Convention, the exclamations against the Louisiana purchase, were not treason. The factionists kept within the letter of the law, and the Union easily survived every war of words.

Whatever danger of disunion existed, prior to the election of Jefferson, was averted by it. Virginia was again at the front. Her disaffection was appeased, her primacy restored, and the Union, instead of being the object of her enmity, was fostered by her care. The northern and eastern Federalists and their southern allies were defeated, their ranks broken and decimated, their leaders humiliated, and their party doomed long to languish and then to die. Jefferson's first election was by a small margin. His second election was by an overwhelming majority. After Jefferson, Virginia added Madison and

Monroe in succession to her brood of Presidents. Thus, for twenty-four years after the retirement of John Adams, Virginia held the Union together. She parted with her sceptre with the graciousness of one satisfied with the fullness of honor, without realizing that it was broken. But it was. At the end of that period she was relatively of far less importance in the aggregate of states than at its beginning. From 1825 to 1860 she continued to proclaim the doctrine of state rights in the tone of one accustomed to command, but other states had become of greater magnitude, and Virginia at last was compelled to realize her loss of power. Thus she rescued the Union from the very danger with which she had threatened it, and nurtured it until it outgrew dependence upon her.

Another fact should be noticed in passing judgment upon the actions and motives of the federal party. Side by side with the establishment and development of our government was exhibited the astonishing experiment of republican government in France. Its experience was mournful. The ten years of its operation, closing with the last century, seemed to exhibit the utter incapacity of the people for self-government. There could be no doubt of the passionate devotion of that people to liberty, their heroic courage, their willingness to make extraordinary sacrifices, or their military strength and skill; but there was a melancholy failure of capacity to establish and maintain any government which could accomplish the results which all desired. While Adams was yet President and the federal party at the height of its power here, the republican rule in France was prostrated before Napoleon, in whom absolute power and despotism were incarnate. The government of the people by the people seemed to be a pitiable failure in France. A like failure here might be prevented by the firm hand of the government.

The federal leaders never professed much sympathy with the people. While they thought they were fit to confer power, they did not think them fit to exercise it. They believed them too ignorant, too fickle, and too easily misled, to be intrusted with the use of governmental power. Hence their policy was to keep them well in hand, to have them look upon the government and its officers with respect and deference, and to be happy if they

were permitted to make a choice of superiors. The sedition laws were the weapon by which the presumption to criticise too freely the government or its officers was to be awed into silence. The Federalists did not gauge aright the new era which was about to dawn. The American people had never been anything more than nominal subjects of a king. They had in reality always been freemen, and under the lead of Jefferson they were not slow to see that they had the same right to participate in the national government which they had always enjoyed in their town meetings and local assemblies. They had not been subjected to the centuries of serfdom which had abased the French peasant, to whom the gift of freedom was so strange a thing that he did not know how to use it. The pomp and ceremonies of royalty could not be transplanted to this continent. Indeed, so slight was their hold here that with the wave of his hand Jefferson swept them all away, and with them all the forms of dress by which the old school gentleman had long been wont to assert his social superiority over the ordinary citizen.¹

The federal party never again came into power. For the sixty years following the inauguration of Jefferson the prevailing party in the country, by whatever name it was called, was largely dominated by the Jeffersonian principle. That principle may be expressed thus, "We are governed too much, let us alone." The nation existed, but it was the states that grew great. The national power was feebly asserted. The national coherence was not firm. Dissolution and disunion were constant spectres, to be averted, not by national strength, but by national concession. Slavery was largely responsible for this, for, unless the states were the dominant power, the Union might some day destroy the institution. The Supreme Court of

¹ It may be worth while to record that the so-called gentleman who paid his respects to Lady Washington, as she was frequently called, wore a very different costume from the dress suit with which we are familiar. His hair was powdered, and a quene or pigtail fell between his shoulders. He wore a small cap of red velvet over one of white cambric, the latter being so adjusted as to form a border of two inches around the velvet cap. A gown of blue damask, lined with silk, a white stock, a white satin vest embroidered, black satin breeches, uniting about the knees with white silk stockings, and red morocco slippers with broad silver buckles, made him presentable. Jefferson changed all this, not by any order or decree, but because he did not adopt or encourage it.

the United States grew to be great, but every other department failed to develop into anything like a controlling factor in the nation's life. The Constitution was so construed in times of peace as to stand constantly in the way of everything except the merely routine work. Great struggles and great debates there were in Congress, but as a general rule the do-nothing policy, both at home and abroad, prevailed. Whenever any question arose between the nation and the states, the states usually had their power and jurisdiction conceded, except, indeed, when the question was brought into the Supreme Court. The nation, however, insensibly and steadily grew under the influence of the court.

James Madison became President in 1809. A treaty was negotiated with England through her minister which promised relief to American shipping, and Madison suspended the non-intercourse act. But England refused to ratify the treaty, alleging that her minister had exceeded his instructions. Madison then restored the non-intercourse act. Meanwhile France pretended to have withdrawn her blockade decrees against England and her allies, but there did not appear to be such evidence of it as was satisfactory to England, who refused to withdraw her decrees against France. The government still had faith in France, and suspended the non-intercourse act as to her and left it remaining as to England. The administration, weary of its miserable, shifting embargo and non-intercourse policy, was now strongly in favor of war with England. There was cause enough, if we had been in condition to fight. England had impressed our seamen, infringed upon our maritime jurisdiction, disturbed the peace of our coasts, established blockades to our injury, violated our neutral rights, and denied every appeal made by us to her for justice. On the other hand she maintained, not without some color of justice, that we had waged war against her in disguise. She had crippled France by destroying her navy, but our ships were ready to furnish her with every supply of provisions and munitions of war that she could pay for. England said that if the United States had withheld these supplies, France would have sued for peace years before.

Congress finally declared war against England on the 18th

day of June, 1812. It is a remarkable fact that five days after that date England withdrew her Orders in Council establishing the blockade. But the war party in the country had been gathering force and audacity so long that Madison, who was a peace man at heart and dreaded the war, was forced to carry it on. The ground for war was the unjust pretense of England to search our ships and impress our seamen. As it was difficult to distinguish an English from an American sailor, it happened that many American sailors were impressed under the false pretense that they were Englishmen. The Americans claimed that, whether English or American, the nationality of the flag determined the nationality of the crew.

The war was characterized by the peace party as "rushing headlong into difficulties with little calculation of the means, and little concern for the consequences." The country was not well prepared for it. It lasted two years and a half. It was discouraging by land, but brilliant on the seas. Fortunately for us, the allied armies of Europe overthrew Napoleon in April, 1814, and sent him to Elba. Peace seemed to be re-established in Europe. England was weary of war after so many years of struggle, and was disposed to make peace with us. This disposition was stimulated by the apprehension that Russia would offer to interpose as a mediator. Russia was friendly to us, and England did not desire to have her sit in judgment upon her pretensions to contraband, blockade, and impressment rights. Nor did she want to be rude to her ally and neighbor. She therefore made more haste to negotiate with us. But we were not in a condition to insist upon rigid terms, and were glad to get out of the war without saying anything about what we went to war for.

After the date of the treaty of peace, General Jackson, before he heard of it, won the brilliant victory of New Orleans. This victory vindicated American valor and prowess, and our people were proud and happy. Although nothing was said in the treaty about the impressment of our seamen, the event proves that it was not necessary to say anything. During the years that have since elapsed, not one American seaman has been impressed by England, or by any other foreign nation.

Although the federal party had given place in the nation to the anti-federal or republican party, it remained strong in New England until the war closed. The party bitterly opposed the war. It hated Mr. Jefferson and his party. His restrictive and really unwise policy, commencing in 1806 and continuing until the war was declared in 1812, was disastrous to the shipping and commercial interests of New England. The Federalists protested that their interests were ruined under the pretense of protecting them. They put obstacles in the way of the prosecution of the war. The governors of Massachusetts and Connecticut denied the right of the President to call out the militia of those states. They denied the right of the federal officers to command the militia when called out. They denied that the President had the right to decide whether the exigency existed which gave him the constitutional right to call out the militia, and claimed the right to decide themselves. They said if they could control their own militia, they could repel any invasion without the help of the United States. The administration practically took them at their word, and left New England to take care of her own coasts and ports.

It was under the exasperation caused by this state of affairs that the famous Hartford Convention assembled in December, 1814. Delegates were sent from all the New England States. Those from Massachusetts, Connecticut, and Rhode Island were sent in pursuance of a resolution of their legislatures ; those from Vermont and New Hampshire were chosen by local assemblies. The legislature of Massachusetts declared that, "The general objects of the proposed conference are, first, to deliberate upon the dangers to which the eastern section of the Union is exposed by the course of the war, and which there is too much reason to believe will thicken around them in its progress, and to devise, if practicable, means of security and defense, which may be consistent with the preservation of their resources from total ruin, and adapted to their local situation, mutual relations and habits, and *not repugnant to their obligations as members of the Union.*"

This convention greatly alarmed the administration. Its sessions were secret. That its members hated the administration

and the war, and regarded the connection of New England with the Union as an evil to be deplored, there is scarcely room for doubt. Nevertheless, judging of their intentions by the resolutions they adopted, it must be admitted that they stopped far short of advising secession. They recommended to the legislatures of the several states to adopt measures to protect their citizens from the operation and effect of the acts subjecting the militia and citizens to drafts, conscriptions, or impressments, not authorized by the Constitution of the United States ; also that the government of the United States be requested to consent to an arrangement by which the New England States might be permitted to defend themselves, and for that purpose keep their proper proportion of the taxes paid by such states, and that these states take proper measures for their own defense against the enemy. The convention also asked that the Constitution of the United States be amended, by providing that slaves should not be reckoned in apportioning taxes and representatives ; that no new state be admitted to the Union without the consent of two thirds of both houses ; that no embargo should exist for more than sixty days ; that without the concurrence of two thirds of Congress, commercial intercourse with foreign nations should not be restricted, nor war declared ; that the President should not be eligible to reëlection ; and that foreign-born citizens should not be allowed to hold office. In conclusion they advised that another convention be held the following June, if the present recommendations should not be heeded.

While this convention kept within the legal rights of free citizens of the United States, its threat to convene another convention was intended to intimidate the government. Fortunately peace was declared within a few days after it adjourned. It had no occasion to reassemble. However honestly mistaken in their action its members may have been, they suffered the political execration of their own generation, and must receive the condemnation of history. When our country is engaged in a life and death struggle with its enemy, however inexcusably it may have rushed into it, duty, morality, and patriotism alike command us not to aid the enemy, and to embarrass our own country is to aid the enemy.

With the return of peace, its blessings followed in rich abundance. The nation seemed suddenly to have become great, and the Union, so sorely threatened during these weary years, became the object of universal pride and devotion. Party spirit relaxed. The federal party was buried in the grave of the Hartford Convention. The British faction and the French faction disappeared with the troubles which nursed them. Not a cloud of danger darkened the national sky. Everybody was willing to join in the proper provision for the waste and cost of the war. Even the republican party consented to surrender its prejudices, and to charter a new national bank, the charter of the old one having expired before the war. The war which had destroyed the shipping interests had developed the manufacturing interests, and since a greater revenue was needed, the tariff was adjusted to protect these infant industries.¹ Strange to say, South Carolina, led by Calhoun, urged the protective tariff, and New England, led by Daniel Webster, resisted it.

James Monroe succeeded Madison as President in 1817. He was a thorough disciple of the school of Madison and Jefferson. He had had a large experience in public affairs, dating from the confederate Congress. He had no capacity for the great problems of political science over which his teachers, Madison and Jefferson, delighted to ponder, but for the practical administration of a government already established upon a solid basis, he was far the superior of either. While the presidency adds little to the just fame of Madison and Jefferson, it preserves that of Monroe from oblivion. His two administrations were of great tranquillity. Parties so far died out that no division existed in the popular vote upon his second election. He then received all the electoral votes save one. The constitutional questions which agitated his administration were

¹ Referring to the stimulus given to manufactures by the embargo and non-intercourse laws, "The advantages of lessening the occasions of risking our peace on the ocean, and of planting the consumer in our soil by the side of the grower of produce, are so palpable that no temporary suspension of injuries on her [England's] part will now prevent our continuing in what we have begun." (Jefferson to De Nemours, June 28, 1809.)

"The spirit of manufacture has taken deep root among us, and its foundations are laid in too great expense to be abandoned." (Jefferson's Works, vol. iv. p. 383.)

chiefly confined to the power of the national government to build great national roads about the country. The West began to be felt as a factor in the nation. It was before the era of railroads and steamboats. It was thought to be wise policy to bind the country together. Business would thrive; states would be brought closer by great national highways; over them foreign immigrants and our own people could move on towards the wilderness and the prairies; the mails could be carried, and troops marched if there should be need. Many schemes of this kind were proposed; the administration favored them, but denied the constitutional power. Internal improvements became the rallying cry of new parties. The great Cumberland Road, which stretched across the mountains from the Potomac to the Ohio River, was begun in 1806.¹ It was the parent of innumerable schemes to build roads at the expense of the nation. Mr. Monroe in 1822 vetoed the bill making appropriations for repairs of this road, assigning as the ground of his veto the unconstitutionality of the laws under which the road was made and maintained.

The Constitution provides that "no state, without the consent of Congress, shall lay any duty of tonnage." Every state at the time of the adoption of the Constitution had a seacoast, and at least one seaport of more or less importance. The early practice under the Constitution was for each state, in order to improve its harbors, seaports, or navigable rivers, to impose some duty of tonnage, and for Congress to pass an act consenting. Congress, however, from the beginning steadily appropriated money for lighthouses and public piers. The state was required to cede to the United States exclusive jurisdiction over them. The admission of states having no seaport was finally followed by complaints that it was unfair for the seaport states to provide for improvements in navigation by levying duties which the inland consumer would have ultimately to pay, while the inland states must make their necessary internal improvements at their own expense. The Cumberland Road was

¹ The construction of this road was the more readily acquiesced in because it gave us a hold upon the Mississippi Valley, which treasonable plots like Burr's might endanger.

the first concession to this complaint. Jefferson, Madison, and Monroe denied that Congress had any power to authorize and maintain these roads upon the territory of a state without the consent of the state. John Quincy Adams held the opposite, but Andrew Jackson denied the constitutionality of such legislation. Nevertheless, Congress, by making provisions for internal improvements in the appropriation bill,—a bill which is generally so framed that the President cannot veto it without depriving the government of the means to perform its functions,—succeeded in making large appropriations for internal improvements.

The success of the Erie Canal in the state of New York, and the introduction of railroads and steamboats, put an end to road-building by the nation, but meantime the improvement of harbors and rivers by the general government was foisted upon it. On the 3d day of March, 1823, the first act for the improvement of a harbor was passed by Congress. It owed its origin to an expression in Mr. Monroe's message vetoing the Cumberland Road bill. While he denied the power of Congress to assert any jurisdiction in a state over a turnpike gate, or bridge, and to punish any one for injuring them or for refusing to pay toll, because these were the domestic matters of the state, he nevertheless said that Congress had power to appropriate money at its discretion for objects of national importance, and the President could not sit in judgment upon the selections of the objects made by Congress. He certainly could, to the extent of his veto. But Congress soon chose to select harbors as the object of the national lavishness, and thence the extension to rivers was easily made. In 1846, President Polk vetoed a river and harbor improvement bill, and in 1856 President Pierce also vetoed one. Congress passed the bill over his veto.¹ Thereafter, this kind of improvement fell into desuetude until 1870, but the public hunger for an appropriation was in the mean time somewhat satisfied by the erection of public build-

¹ On the last day of his administration President Tyler vetoed a bill forbidding a payment for armed steamers which he had ordered without lawful authority. Congress promptly passed the bill over his veto,—the first instance of the kind under the Constitution.

ings, such as post-offices, custom-houses, and the like. In 1870 a river and harbor bill appropriating \$2,000,000 was passed, and was approved by President Grant. The power of Congress "to regulate commerce" is now supposed to embrace this power. The public rapacity was manifested by the rising tide of appropriations, until in 1883 they reached the sum of \$18,700,000. President Arthur vetoed the bill, but Congress immediately passed it over his veto. In 1888 a bill appropriating over \$20,000,000 was allowed to become a law. It is useless now to discuss the constitutional power of Congress to appropriate money for the improvement of rivers and harbors, since the congressional and presidential decisions are final upon such a question and have been approved by the Supreme Court;¹ but as a question of expediency and morality, in view of the system of "log-rolling" by which the appropriations are inflated and carried, it is to be regretted that the conservative construction of Jefferson and Madison should have been departed from. Neither political party has virtue enough to refuse the improper appropriations demanded for this purpose.

In Monroe's administration we acquired Florida from Spain for the sum of \$5,000,000. By the treaty of cession the Sabine River was described as the boundary between Louisiana and the Spanish dominions. It was subsequently alleged that we thus gave away our claim to Texas,—a claim which we ought to have made good under the Louisiana purchase from France.

In President Monroe's message of 1823, the declaration since famous as the "Monroe doctrine" was made.

The occasion for the declaration was this: After the downfall of Napoleon, three of the powers arrayed against him, Russia, Austria, and Prussia, together with France, then restored to monarchy, formed what was termed the "Holy Alliance," to maintain the principle of the legitimacy of the existing dynasties. If the principle should be threatened in Europe, these powers promised armed interference to protect it. This was in 1820. England had acquiesced in this agreement of the Holy Alliance. But in 1823 France sent an army into

¹ *South Carolina v. Georgia*, 93 U. S. 4; *Wisconsin v. Duluth*, 96 U. S. 383.

Spain, overthrew the constitutional party, and reëstablished the absolute monarchy. England resolved that if France were to dominate over Spain, it should not be over the Spain of the past. England also preferred that the revolted dominions should remain independent, hoping to establish better trade facilities with them in their condition of independence than if they were controlled by Spain or by the Holy Alliance. Besides, she wanted the United States to disclaim all intention of acquiring any of the American Spanish states. Her secretary of foreign affairs represented to our government that England apprehended that the Alliance entertained the project of armed intervention to reduce the revolted Spanish dominions in North and South America to the control of such monarchical governments as the Alliance might dictate. Our government was afraid that the Holy Alliance would restore all South America to Spain and reinstate Spanish dominion over Mexico. President Monroe, in his message in 1823, thereupon said: "We owe it to candor and to the amicable relations existing between the United States and the allied powers to declare that we should regard any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere, but with the governments which have declared their independence and maintained it, and whose independence we have on great consideration and just principles acknowledged, we could not view an interposition for oppressing them, or controlling in any other manner their destiny by any European power, in any other light than as a manifestation of an unfriendly disposition towards the United States. . . . The American continents should no longer be subjects for any new European colonial settlement."

This was bold doctrine for the United States to promulgate. Compared with the powers which composed the Holy Alliance our country was feeble. But the proclamation commanded respect. This doctrine is not law, but the declaration of a policy. If any occasion should arise for its application, our government would be governed by the circumstances, and do-

what it should think right. Indeed, it refused to interfere in 1863, when France placed Maximilian on the throne of Mexico. But then we were engaged in our civil war, and one war at that time was all we could well attend to. After the war our government signified to France that the presence of her troops in Mexico was disagreeable. The troops were withdrawn, and Maximilian and his empire perished. In the Venezuela boundary dispute, which arose during the second administration of President Cleveland, our government interposed when the subject was not the founding of "any new European colonial settlement," but an alleged encroachment by Great Britain upon the territory of Venezuela, by her assertion of a boundary line between the territories of the two powers which would give to Great Britain more territory than Venezuela admitted to be right. The interposition, however, did not pass beyond the control of diplomacy, but resulted in an arbitration amicably adjusting the controversy substantially in favor of Great Britain's claim. The Monroe doctrine asserts a policy which the people of the United States will sustain and enforce, if any occasion should arise in which we should feel justified in asserting it.¹

¹ During the administration of John Quincy Adams, the fate of Cuba and Porto Rico was largely determined by the Monroe doctrine and the slavery question. In the revolutions of the Spanish American provinces, which followed upon the subjugation of Spain by Napoleon, and finally ended in their independence, Cuba and Porto Rico held aloof. Spain was for a time encouraged by the Holy Alliance to hope that the allied powers of Europe would intervene to restore her dominion over these provinces, but the objection of England and the promulgation of the Monroe doctrine by the United States, prevented the intervention. Spain, however, continued in her hopeless struggle to repossess her revolted provinces. Mexico and Columbia, in order to strike at Spain, meditated the conquest of Cuba and Porto Rico, and began to prepare for it. France wished to acquire Cuba and Porto Rico, and Spain, if she could not retain them, preferred to cede them to France, or any other European power, rather than have them become the prizes of her former subjects. Mexico asked the United States to assist, recalling the implied pledge of the Monroe doctrine. The United States declined, and at the same time asked Columbia and Mexico to abandon their purpose to take the islands from Spain. The United States urged Russia to advise Spain to give up her struggle with her American provinces, and expressed her unwillingness that Cuba and Porto Rico should pass from Spain to any other European power, or become independent. The result was that Spain retained Cuba and Porto Rico, and finally abandoned her pretensions to recover her lost provinces. The reason for this attitude of the United States was the fear that Cuba and Porto Rico, if taken from Spain by Mexico or Columbia, would become either republics or repub-

lican colonies in which negro slavery would be abolished, and the negro race would either attain to power or share in it, and thus these islands would become not only places of refuge for escaping slaves, but like Haiti, examples of the negro race exercising governmental power, and possibly assuming a separate and equal station "among the powers of the earth." If France should acquire Cuba, the sentiments of "liberty, fraternity, and equality" which the French Revolution had developed might contribute to the same result. Nothing of the kind was feared from Spain. The United States did not wish to acquire and govern the islands. Its constitutional right to do so was doubted; and if that should be conceded, a successful negro insurrection in the islands might endanger the institution of slavery in the United States. Moreover, England objected, and of course Spain would resist. It was not desirable that any strong European power should hold such a vantage ground so near to the United States, threatening both its trade and security. Under any other rule than that of Spain it was felt that the islands would become a menace to slavery in the United States. To protect this institution the United States assisted in prolonging for more than seventy years Spain's yoke of servitude upon Cuba and Porto Rico,—a yoke from which it has at last delivered them. (Benton's Debates in Congress, viii., ix., title, "Panama Mission.")

CHAPTER X.

THE JACKSON ERA. — BANK. — OFFICE-HOLDING. — TARIFF. — NULLIFICATION. — WHETHER THE CONSTITUTION IS A COMPACT BETWEEN STATES, OR THE SUPREME GOVERNMENT OVER THE PEOPLE? — ANNEXATION OF TEXAS. — CLOSE OF THE PERIOD OF NARROW CONSTRUCTION.

THE decay of old party lines, the new interests of a growing country, and the ambition of younger statesmen gave rise to new party divisions. John Quincy Adams was Secretary of State under Mr. Monroe. He was originally a Federalist, but had supported the late war and was in favor of internal improvements. He led a new party of Adams Republicans. William H. Crawford was at the same time Secretary of War. He was the leader of the old line Republicans, and obtained the congressional caucus nomination for President. Henry Clay had also been a Republican, but was now the eloquent and magnetic leader of a large following who favored a protective tariff and internal improvements. He expounded the Constitution in accordance with these measures.

Andrew Jackson had been nominally a Republican ; he was the hero of New Orleans, and of a war against the Indians in Florida. He relied more upon his personal popularity in the Southwest than upon any policy in civil affairs. The scattered portions of the old parties, which had no distinctive theories of governmental policy, were greatly attracted to this new character in American politics, and they rallied around him under the name of Democrats. These four men were candidates for the presidency to succeed Mr. Monroe. When the electoral votes were counted, Mr. Jackson had 99, Mr. Adams 84, Mr. Crawford 41, and Mr. Clay 37. As no candidate had a majority, the election devolved upon the House of Representatives, voting by states, each state having one vote. Clay was the lowest in the list of four, and his name could not come before

the House. His friends, however, united with those of Adams, who thus obtained the majority and became President. Adams was a man of unusual ability and attainments, of impressive eloquence, of great patriotism, and also of great prejudices; but his prejudices were usually directed against the men and measures that he conceived to be opposed to the welfare of the nation. His ideal of his duty as chief magistrate was a severe and noble one. He would serve the nation for the nation's welfare, and no considerations of personal or party advantage would swerve him from his sense of the fit and becoming. His administration was marked by the excitements which attended the formation of new political combinations, and the struggles of contending rivals for supremacy. With the exception of the refusal of the state of Georgia to recognize the right of the United States to enforce treaty obligations with the Indian nations in that state,—of which mention will be made hereafter,—his administration was wise and happy. But the star of Andrew Jackson was in the ascendant, and Adams retired at the end of one term.

With the accession of Jefferson the reign of the masses began. With the accession of Jackson the masses placed one of themselves in the presidency. All the previous Presidents had had large experience in public affairs, and with the exception of Washington, all had been men of high scholastic culture.

Andrew Jackson was a curiosity even among American politicians. Our population had been greatly swollen by immigration. The native and the immigrant, who fled the civilization of the Atlantic coast to carve out new states from the wilderness and prairies of the West, formed a rough, brave, impulsive, and generous people. Jackson was the product of this mixed civilization. The victor at New Orleans and of many an Indian fight, he became the hero of the frontiersmen. He held about the same relative rank among the statesmen of the age that the dime novel of our times holds in our literature,—his exploits and qualities captured active and untutored imaginations. He had learned to read and write, was unable to make a connected speech, but had an imposing command of short

sentences, positive, energetic, and denunciatory. In pursuit of an end he marched directly towards it, crushing obstacles, seizing means, and compelling success. He was patriotic and honest in his feeling, with a sense of honor somewhat peculiar, but to which he firmly held, though he was liable to be duped by the flatterers who inflamed his prejudices and inflated his vanity. His capacity was small to distinguish between fair opposition and dishonest intrigue, and he hated a contention which was conducted by argument instead of blows. His daring and brilliant military exploits had given him a national reputation. Presidential nominations had long been dictated by congressional caucuses at Washington, and popular sentiment had at last been aroused to resist such dictation.

The frontiersmen placed Jackson in nomination, as their tribute to their idol and their protest against caucus dictation. The nomination was at first regarded at the East as the extravagance of the frontier, but the election placed Jackson highest at the polls. The division in the electoral vote resulted in the election of John Quincy Adams. The popular tide thenceforth steadily rose, and at the next election bore Jackson into the presidency. He brought to the office all the faults and merits of his qualities. His methods were irregular, his conceit unbounded, but his intentions were honest and patriotic. He was easily duped but never intimidated. He was no demagogue. If he ever deceived the people, it was because he mistook the false for the true. He administered the government as if it were his personal estate. His administration was a new era in politics. He made and destroyed statesmen, characters, and institutions, gave his name to his party, and designated his successor. Unwise and dangerous as he was, there was a certain majesty of heroic greatness in his character that enabled him to lead captive in his train greater men than himself, and to secure an acclaim of personal admiration and devotion, such as writers of romance tell us the Highland clansmen accorded to their chiefs. And it must be conceded that his weaknesses and failings, his passions and prejudices, were relieved and ennobled by a patriotic stubbornness and by a passionate devotion to the Union. He was mercilessly ridiculed by his enemies,

and extravagantly praised by his friends. With the masses this praise was sincere; but sycophants were not lacking, who bartered their self-respect for official thrift. It may be well to have had one such President as Jackson, in order to fix in history a typical picture of the man whom the masses, when conscious of their power, delight to honor.

He wrought one change as great as if effected by a constitutional amendment. Hitherto men had held office under executive appointment, usually so long as they performed their duties satisfactorily. But, under Jackson, the offices became the spoils of victory, and with the exception of the greater stability of tenure of subordinate offices, effected by the civil service laws, have substantially continued so ever since. Henceforth politics became a sort of game for the personal advantage of the player, and the state furnished the stakes to be won. This decline in the tone and standard of the public service seems, however, to have been the natural result of the accession of the masses to power. Jackson himself was the first fruits of the new era. The army of aspirants for place and pay rushed in swarms to Washington upon his first inauguration. Strange to say, the public service did not decline so much as did the quality of the public servants. The public offices were filled with Jackson's friends and admirers, who shouted for him and an appropriation.

Low as the motives and character of the spoilsman have been who have forced their way to the public crib, the official service of the nation has in the main been well performed. Two reasons may be assigned for this. Official duty is prescribed by law, and routine and system prevail; the spoilsman is looking for the spoils, and not to betray or destroy his country, and hence is generally found upon the side of regularity and good order, and not unusually upon the side of reform, so long as reform exhausts itself by passing resolutions and making speeches. He is not a criminal; criminal misconduct in office has as a rule been rigorously punished. If we regard government as a machine, it is found that the spoilsman become expert machinists, and generally keep the machine in the performance of its appointed functions. It cannot be denied that

the spoilsman is the natural product of a constitutional government, based upon universal suffrage. Any one can appeal to the masses for election to the highest office, or if he does not wish to be a candidate himself, he may become such an organizer and manager of votes as to exact terms from the candidates, and hence may obtain by appointment the place, and power, and emolument which he seeks. Our real protection against the evil ought to be in the public intelligence and virtue. To some extent we have this protection. The career of the dishonest spoilsman is usually short, for he is generally ejected, when detected and publicly exposed. But the accomplished demagogue usually has the art to conceal his art and motives. Our protection against him is in the Constitution and laws. To be successful, he must profess the utmost devotion to them; they are an essential part of his existence. Indeed, he may serve his country well; if he does, his motives, as well as his more virtuous competitors whom he has distanced, stand eclipsed in the shadow of his success. The Constitution and laws ought to reduce the danger to its minimum.

This influx of demagogism in Jackson's administration alarmed the old-school statesmen. Calhoun, speaking the sentiments of many, thus denounced it: —

“ When it comes to be once understood that politics is a game; that those who are engaged in it but act a part; that they make this or that profession, not from honest conviction or intent to fulfill it, but as a means of deluding the people, and through that delusion to acquire power,—when such professions are to be entirely forgotten,—the people will lose all confidence in public men; all will be regarded as mere jugglers, the honest and patriotic as well as the cunning and the profligate; and the people will become indifferent and passive to the grossest abuses of power, on the ground that those whom they elevate, under whatever pledges, instead of reforming, will but imitate the example of those whom they have expelled.”

The spoils system will last as long as popular suffrage. The most that can reasonably be expected is—to regulate it and make it as decent and serviceable as possible. This is the true mission of the civil service reformer.

President Jackson smote the United States Bank with his veto, and it withered and died. He was denounced by his enemies for his abuse of the veto power. He had the constitutional right to use it. Our later experience is that the veto power is frequently used, is a most wholesome restraint upon bad legislation, and ought to be used more frequently.

In furtherance of his crusade against the bank, he required the Secretary of the Treasury to withdraw the funds of the United States, deposited with it in pursuance of the law, but subject to removal in the discretion of the Secretary. The Secretary, required to report to Congress only, refused, and the President removed him and appointed another, who complied. Party spirit ran high, and the Senate passed a resolution to the effect that the President, "in his proceedings in relation to the public revenues, had assumed upon himself power and authority not conferred by the Constitution and laws, but in derogation of both." Jackson replied in a protest which he demanded should be entered upon the journal of the Senate. The Senate refused to enter his protest. Three years later the resolution of censure was expunged from the records.

These events caused great excitement. The President had the constitutional power to remove the Secretary of the Treasury, and appoint another in his place. Whether it was proper for him thus to control the officer who was governed by the laws, and obliged to report to Congress, is a debatable question. He thus controlled the disposition of the public funds. The Senate had no constitutional authority upon which to base its resolution of censure. The President is not in any way subject to the discipline of Congress, until he shall have been impeached by the House of Representatives. It had the physical power to pass the resolution, just as it might pass a resolution of compliment or of sympathy. The subsequent expunging resolution violated the integrity of its journal of proceedings, which the Constitution requires it to keep. These proceedings may now be regarded as effervescences of partisanship, instead of authoritative precedents of constitutional construction.

The protective tariff now became the chief object of political attention. Prior to the war, New England was in favor of free

trade, for her shipping interests thereby thrrove the better. Our supplies of manufactured goods were largely received from England. In a month after the declaration of the war of 1812, the duties upon imported foreign goods were increased 100 per cent. Under the stimulus of this duty, manufacturing increased with great rapidity. After the peace, President Madison, in his message to Congress, recommended the consideration of means to preserve and promote manufactures, which he said "have sprung into existence and attained an unparalleled maturity throughout the United States during the European wars. This source of national wealth I anxiously recommend to the prompt and constant guardianship of Congress." In 1816 Congress lowered the duties to what was supposed to be a peace basis. The importation of goods increased from \$12,000,000 in 1811 to \$121,000,000 in 1819. New England, however, favored the return to free trade after the war, and the South opposed. Under the tariff, New England developed such manufacturing interests that she changed her position, and demanded its continuance. The South also changed her position and demanded free trade and opposed the tariff. Both sections were true to their interests. Webster began his career in Congress as a free trader. Calhoun began his a few years later as an advocate of a protective tariff. Each one was compelled by events to reverse his position. Webster had to take care of his constituents, who had embarked in manufactures upon the faith of the tariff; and Calhoun in the end had to oppose the tariff, because his constituents sold their cotton and bought their manufactured goods. They came to feel that if the price of everything they bought was increased by a duty, then their agriculture was taxed in order that the manufacturer might thrive.

It is interesting to notice that in 1790 a tariff for the protection of cotton goods was laid. Mr. Burke, a representative from South Carolina, stated in Congress in 1789 that the raising of cotton was in contemplation, and if good seed could be obtained, he thought it might prosper.

The peace tariff of 1816 was so adjusted as to extend protection to the interests developed by the war; the South sup-

ported it as an act of justice to the North, and somewhat, no doubt, to conciliate the section so greatly exasperated by the war. The constitutional argument was then waived, or was not regarded as valid. The tariff was supported by many as a temporary act, to be superseded by one better adjusted to every interest, after the country should have sufficiently recovered from the losses and disturbances of the war. But the manufacturing interests developed by protection demanded that the protection should continue. In 1824 Mr. Clay, who had made protection to American industry the chief feature of his political policy, had the address to procure the passage of an act to increase and extend the tariff. The South became angry. Its cotton production had grown to be enormous. As the Constitution prohibited any duties upon exports, it was plain that the South could grow rich if it should not have to pay too high prices for the goods it bought.

The fact was, it was gradually falling in debt and becoming poorer. This state of things was charged to the protective tariff, which increased the price of many articles which the South consumed. Whether those articles were purchased abroad or from the North, the result was the same to the purchaser; because in the one case the duty went to the government, and in the other it enabled the northern manufacturer to get a higher price. In the colonial condition, the southern colonies were rich and the northern poor. But in 1824 and later the Northern States were rich and the Southern poor. The North became a money-lender to the South, and southern planters made journeys to the North to borrow money upon their patrimonial estates. All this, too, as Benton in his "Thirty Years' View" expresses it, in face of the fact that southern exports since the Revolution had amounted to the sum of eight hundred millions of dollars, a sum equal to the product of the Mexican mines since the days of Cortez.

The South charged this result upon the tariff; it had been drained that the North might thrive. In 1828 another revision and extension of the tariff took place. The South charged that this was brought about by the agency of New England, in order to gratify the cupidity of her wealthy manufacturers. Public

meetings were held in South Carolina, and the indignation and anger of her people were freely expressed. The constitutional argument now received prominence. The eighth section of the first article declares that "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." That is, as urged by the South, it could impose duties solely for the purposes of revenue, to pay the debts and expenses of the government, and in order to provide for the general welfare; therefore, since no other purpose was expressed, Congress could impose duties for no other purpose; certainly not for the purposes of protection, when the power is only given for revenue; clearly, also, this was opposed to the general welfare, since while it benefited one section it injured another. It is now settled that where the power is given to Congress to do an act, such as to lay duties, the courts will not inquire into the purpose. The exclusive power being vested in the legislature, the courts must respect the power and cannot revise its exercise. But it is just as much the duty of Congress as of the courts to decide correctly, and if the only power conferred upon Congress is to lay duties for the purposes of revenue, it is clearly wrong for that body to lay duties for the primary purpose of protection. Congress should not take advantage of the fact that the courts have not the power to interfere.

There was another reason why South Carolina insisted upon a tariff for revenue only, but prominence was not given to it. Protection to home manufactures gave the North increased population, and thus a larger representation in Congress. It extended the field of white men's labor, and thus increased the natural enemies of slave labor, and of the system which degrades labor. A tariff for revenue only, if framed by slaveholders, would be laid upon articles which home industry could not produce, such as tea, coffee, and spices. Thus, white laborers and voters would not be multiplied so fast at the North, and necessary articles of consumption could be bought of the foreign producer for the least money. A tariff for revenue only would lessen a peril to slavery and save money to the slaveholder.

The people of South Carolina, under the lead of such able men as Calhoun and Hayne, accepted their construction of the Constitution, and believed that a protective tariff was an inexcusable outrage. The state had recourse to the famous Kentucky and Virginia Resolutions of 1798.¹ A convention was called in which the people were invited to assert their rights. Their leaders asserted the right of nullification. The South Carolina doctrine of nullification was an alleged application of the doctrine of the Kentucky and Virginia Resolutions. The claim was that under the Constitution a state has the right to judge respecting the constitutionality of an act of Congress, and if it decide it to be unconstitutional, to nullify it. The argument upon which this claim rests may be briefly stated.

The Constitution is a compact between the states; the states were the parties making the compact; the United States was brought into being as the creation or creature of the compact, not a party to it, but an agency made and appointed by it to exercise only the powers delegated by the states, and hence the parties, authorizing by the compact the agency, have the power to judge whether it exceeds the delegated powers, and if so to repudiate such unauthorized action, and nullify it. That the Constitution is a compact between the states was, in addition to the historical argument, made to rest upon various provisions of the Constitution,² and especially upon the eighth article, which says: "The ratification of the conventions of nine states shall be sufficient for the establishment of this convention between the states so ratifying." It is thus shown to have been established by ratification of states, and between states, and hence a compact between them. The United States could be in no sense the superior of the states, because the creature of the compact, and hence only existent under the compact, and destitute of all powers except those conferred by it. This was also shown by the tenth amendment to the Constitution, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." This, it was urged, is an explicit declaration that the Constitution confers upon

¹ *Ante*, p. 154.

² *See ante*, p. 105.

the United States the powers enumerated in it, and withholds all others. In case of an alleged usurpation by the United States of powers not delegated, each state has the right to judge respecting the usurpation, because, as it was urged, each state is a sovereign state, and an equal party to the compact, and can have no superior; and not only has an equal right with every other state to judge, but, of necessity, must exercise that right, since no other competent judge exists. The United States cannot be the judge, since it is an inferior, being the mere creature of the compact, and in no sense a sovereign over the states, but merely an agent for the states in certain enumerated particulars. In case of an alleged usurpation of powers by the United States, palpable and dangerous, the state has the right to interpose and arrest the action of the United States, because some remedy is necessary, and no other exists. It thus stops aggression and usurpation, and admonishes its creature and agent to retire within its rightful powers. An agent can only use his delegated power for the benefit of his principal and never against him; the delegation of power is not its surrender, and if the principal resumes it, he simply resumes his own.

Nullification had been suggested by Kentucky in 1799 as a proper remedy. It was said now to be a proper remedy. It must be declared by a convention of the people of a state properly represented by delegates. Nullification is but the solemn declaration of the people that the act is null, which without such a declaration is already null *per se*. It was not quite clear what the further action of the state should be, if, notwithstanding the nullification, the United States should persist in its alleged usurpation. Mr. Madison, who was still living, said nothing further was contemplated by the Virginia Resolutions in 1798, than respectfully to remonstrate against the alien and sedition acts, and to procure either their repeal by Congress, or to secure the coöperation of other states and procure an amendment of the Constitution. John Taylor of Caroline said that "The appeal is to public opinion; if that is against us, we must yield." So understood, the doctrine now called Nullification had been the accepted creed of the anti-federalist or republican party from 1798. It was suggested by

some who sympathized with South Carolina, but were opposed to secession, that the states, the makers of the compact, could, in a convention called under the fifth article of the Constitution, consider the objections of the nullifying state, and propose amendments, which, if ratified, would bind such state, or compel it to abide the hazard of revolt; but until this recourse should be exhausted, the Union must respect the nullifying act of the state. Under the pressure of practical nullification in South Carolina, it was plain that the logical result of the doctrine, in case the United States should refuse to recede, must be the secession of the state, or coercion by the United States. Secession was logical, for if the doctrine of compact was sound, then, when the compact was broken, the state was released from it. The real end, therefore, of the compact theory was secession and dissolution of the Union. But South Carolina said she did not propose to secede; she meant to remain in the Union. She would thus enjoy its benefits and repudiate its burdens. The eighth section of the first article provides that "All duties, imposts and excises, shall be uniform throughout the United States." Of course South Carolina could not refuse to pay her share, and yet remain in the Union. Such a position was indefensible.

Meanwhile another line of reasoning and argument had been brought out and adopted by the Supreme Court under the leadership of its Chief Justice, John Marshall. In the grasp of his intellect, the clearness of his understanding, the acuteness and accuracy of his analysis, and the solidity and strength of his demonstration, the great Chief Justice is now acknowledged as a master of constitutional discussion. Mr. Webster was entirely familiar with his weighty judgments. He had contended at the bar for the principles announced from the bench, and he said in the great debate with Mr. Hayne in the Senate in 1830, "It is a subject of which my heart is full." In this debate he advanced the line of argument which was ultimately to prevail. No speech delivered in America has more renown. As a study of lofty, commanding, and genial eloquence, it remains a masterpiece. Our countrymen are copious in oratory, but durable specimens are rare. We praise our orators, but

seldom quote them. Mr. Webster's speech upon this occasion was the beginning of a revolution in the construction of the Constitution. He boldly combated the accepted construction, and in the judgment of posterity overthrew it.¹

The principal points of his argument were: The Constitution is not a compact or league among the states; it is a constitution; a constitution is fundamental law. It was not made by the states, but by the people, and is therefore the fundamental law of the people. Its language is, "We, the people of the United States, do ordain and establish this Constitution." Being the fundamental law, there can be no law or act of any state superior to it, else it would not be fundamental. It declares its own superiority in these words (art. 6, sec. 2): "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The states are sovereign with reference to each other and to the Union only so far as their sovereignty is permitted by this supreme law. But the states derive their power from the people, and in so far as the people have given higher power and absolute sovereignty to the United States, no state can question it. The people have given to the United States, and *not* to the states, the power to decide any case of alleged infraction by the United States of the power of the states, and likewise any infraction by the states of the power of the United States. That power to decide is, in some cases, Congress, and in others, the judicial power of the United States. The language is: "The judicial power of the United States shall extend to all cases in law or equity arising under this Constitution and the laws of the United States." The people, therefore, by the Constitution have created the tribunals to decide, the Supreme Court in all

¹ Mr. Blaine, in his Twenty Years in Congress, states that "the speech of Webster upon that occasion had the force of an amendment to the Constitution. It corrected traditions, changed convictions, revolutionized conclusions. It gave to the friends of the Union the abundant logic which established the right and power of the government to preserve itself."

cases between litigants, Congress in all political cases, not the subject of judicial decision. The Constitution of the United States created a government of the people, for the people, over the people; not of the states, for the states, over the states. Within its granted powers it binds all wherever they are. Now, if this government admits the right of any to disobey, it surrenders its right to govern them, and therefore as to them ceases to be a government. Hence government must necessarily imply the right to compel obedience, to subdue resistance, here, there, everywhere. It cannot keep that power, if, superior to itself, there exists the acknowledged power to decide upon the rightfulness and authority of its own acts. Being a national government, it must have the power to prevent or overcome any act which seeks to set it aside; for the defense of its own existence is the prime necessity. Being a government of the people, by the people, for the people, it binds all the people. If the state has equal power with the United States to decide upon any question of infraction by the United States of the Constitution, then, whenever it shall decide that question in its own favor and enforce its decision, the inevitable result must be the supremacy of the state over the United States, and consequently the destruction of the United States.

Mr. Webster subsequently formulated the results of his argument in four propositions, as follows:—

“ 1. That the Constitution is not a league, confederacy, or compact between the people of the several states in their sovereign capacities; but a government proper, founded on the adoption of the people, and creating direct relations between itself and individuals.

“ 2. That no state authority has power to dissolve these relations; that nothing can dissolve them but revolution; and that consequently there can be no such thing as secession without revolution.

“ 3. That there is a supreme law, consisting of the Constitution of the United States, acts of Congress passed in pursuance of it, and treaties; and that in cases not capable of assuming the character of a suit in law or equity, Congress must judge of and finally interpret this supreme law, so often as it has

occasion to pass acts of legislation ; and in cases capable of assuming, and actually assuming, the character of a suit, the Supreme Court of the United States is the final interpreter.

" 4. That an attempt of a state to abrogate, annul, or nullify an act of Congress, or to arrest its operation within her limits, on the ground that in her opinion such law is unconstitutional, is a direct usurpation on the just powers of the general government, and on the equal rights of the other states, a plain violation of the Constitution, and a proceeding essentially revolutionary in its character and tendency."

It may appear strange to us, but the bold annunciation by Mr. Webster that the Constitution is the work of the people, and not of the states, was received with a sort of horror by the party opposed to him, as a new and dangerous heresy. But thenceforth this position was the vantage-ground from which the weapons of assault were directed against the heresy of nullification. It must be conceded, however, that the Supreme Court of the United States was not the arbiter appointed to decide upon an important point in dispute between South Carolina and the United States, namely, the constitutional power of the United States to levy duties for the purpose of protecting American industry against foreign competition. There is no practicable way to present this question to the court, unless Congress shall, in an act levying duties, declare the sole purpose of the levy to be to protect American industry. In such case an individual, upon refusing to pay the duties, could bring the question before the court. Mr. Calhoun, it is said, desired that some bill, so framed, should be passed, but of course any bill levying duties is in some sense a revenue bill, and under color of this fact it was easy to refuse Mr. Calhoun's request.

South Carolina, in 1830, passed a bill authorizing the people to call a convention to nullify, in that state, the obnoxious tariff acts. The proposition to call a convention was submitted to the people, and at first failed to command sufficient votes.

Following that failure, South Carolina was bantered by the protectionists, and was threatened by President Jackson. The nullifiers thought to turn public opinion in their favor by the toasts and speeches to be delivered at a dinner in Wash-

ington in 1830, on Jefferson's birthday. President Jackson was invited, and it was hoped to commit him to the nullification utterances of the managers. The regulation toasts were prepared to honor Jefferson as the father of the doctrine, but Jackson confounded the managers by giving the toast, "Our Federal Union; it must be preserved." Never was a toast more efficient. If the democratic party was marching towards nullification, that toast called a halt which was promptly obeyed.

In 1832 another tariff act was passed by Congress, and under the indignation caused by this supposed increase of injury, the nullifiers commanded the popular vote. In October of that year the famous convention was ordered. A convention properly convened is the assemblage of the people and of the state, and possesses all the powers reserved to both. The state as represented by its officers is but the creation of the people, the legislature but one of the organs of the state; and hence both state and legislature combined fail to wield all the powers of the people. It was therefore thought proper to have the people assemble in convention. The convention duly assembled. It adopted an ordinance styled "An ordinance to nullify certain acts of Congress of the United States, purporting to be laws laying duties and imposts on the importation of foreign commodities." The fallacy of a self-operating nullification ordinance was practically conceded, and the state advanced to the more logical position of threatened secession if the United States should not respect the ordinance.

This ordinance purported to sweep out of existence, so far as South Carolina was concerned, every vestige of a national tariff. It went further; it declared that "the people of the state would henceforth hold themselves absolved from all further obligation to maintain or preserve their political connection with the people of the other states, and would proceed forthwith to organize a separate government, and do all other acts and things which sovereign states may of right do." The ordinance, prudently, was not to take effect until three months later. This time was given, not only to enable the state to get ready for the new order of things, but to give other states an oppor-

tunity to join with South Carolina, and also in the hope that the United States would recede. The convention issued an address to the public styled an "Exposition," in which the case of the state is set forth with great eloquence and force.

On the 10th of December, 1832, President Jackson issued his proclamation, denouncing this attempt of South Carolina to nullify the laws of the United States, and, following the line of Webster's great argument, showing the supremacy of the United States, exhorting the state to recede, and threatening coercion and punishment in case of any resistance to the execution of the laws of the United States. The President closed by saying: "The laws of the United States must be executed: I have no discretionary power on the subject. My duty is emphatically pronounced in the Constitution. Those that told you that you might peaceably prevent their execution deceived you. Their object is disunion, and disunion by armed force is treason. Are you ready to incur its guilt? If you are, on your unhappy state will fall all the evils of the conflict you force upon the government of your country."

Calhoun was at this time Vice-President. He resigned that office, and was immediately elected by South Carolina to the United States Senate. Governor Hayne of South Carolina issued a counter proclamation, warning the people of the state not to be seduced from their primary allegiance to the state by the "pernicious and false doctrines of the President."

President Jackson promptly caused United States troops to be thrown into Fort Moultrie in Charleston harbor, and a sloop of war was sent to that harbor for the purpose of aiding the United States revenue officers, if aid should be needed, in collecting the revenue. Congress assembled the first Monday of December. Bills were introduced and passed, authorizing the President to use what force might be necessary to execute the laws; and then the laws were executed. At the same time bills were introduced to reduce the tariff. A desire to conciliate South Carolina was strongly prevalent in Congress. Clay and Calhoun, the two champions of the opposing systems, came together and concocted a bill, which proposed a reduction of the tariff, to be gradually effected in the course of ten years.

It was hoped that all interests, both of the manufacturers of the North and the cotton producers of the South, would be preserved unharmed. Clay, it was said, was afraid the Union would be dissolved ; Calhoun, some said, was afraid Jackson would hang him.¹ The compromise measure, as it was called, encountered bitter opposition, especially from New England. Webster truly said, it would be yielding great principles to faction ; that the time had come to test the strength of the Constitution and the government. Davis, also senator from Massachusetts, said, " You propose to sacrifice us to appease the unnatural and unfounded discontent of the South,— a discontent, I fear, having far deeper root than the tariff, and will continue when that is forgotten." Benton pointed out the absurdity of one Congress attempting to bind another. Nevertheless, the bill passed ; South Carolina claimed to have won the victory, repealed her secession ordinance, and compliance with the laws was never suspended.

Looking back over the intervening years, it is scarcely to be doubted that the compromise, so far as it was designed to avert the necessity of enforcing the laws of the United States, was a great mistake. South Carolina stood practically alone. True, the states of Virginia, Georgia, and Alabama passed resolutions of sympathy and approval, and gave some assurance that they would join her in forming a southern confederacy. North Carolina emphatically repudiated her action. Jackson had the nerve and vigor to put down the rebellion. He hated Calhoun ; he was eager for the fight ; and but for the compromise, the integrity and supremacy of the Union might have been maintained, and the heresy of secession crushed, at a tithe of the expenditure of blood and treasure which it cost thirty years later when eleven states united in rebellion.

Respecting the merits of the South Carolina or secession argument, it must be conceded that the corner-stone upon which it rests, namely, that the Constitution is a compact between sovereign states, and that the government of the United States,

¹ " However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason." (*Ex parte Bollman*, 4 Cranch, 126.)

or, as Calhoun expressed it, of the states *united*, is the creature of that compact, is, as a mere academic disputation, strongly supported. It had the support of the great authority of Jefferson and Madison, and was scarcely contested in Congress until Webster hurled the massive weight of his eloquence and argument against it in 1830. Nor is the proposition that the government of the United States is a government formed by the people wholly unassailable. The truth is that Webster gave to the preamble of the Constitution, and to the fact that it was adopted by conventions of the people in the several states acting for their respective states, a weight which the facts of history scarcely justified. The confederate Congress was jealous of the convention which framed the Constitution. The convention did not expect Congress to approve a constitution which put a period to its power and existence. The convention saw, in conventions called in the several states for the purpose, a better prospect of the adoption of the Constitution than in the several legislatures, elected for other purposes, and naturally jealous of the state rights and powers which the Constitution would restrict.

The phrase, "We, the people of the United States," in the preamble, was originally followed by the words "of New Hampshire, Massachusetts," etc., naming the thirteen states; but as the Constitution was to become valid between nine ratifying states, and as it was possible that no more would ratify it, the names of the states were stricken out, so as to adapt it to nine or more, as the case might be. But Webster's main proposition that, whether formed by states or people, a government was established supreme over all the people of all the states with respect to its enumerated powers, was thoroughly unassailable; that as such it was the final judge of its own powers, subject only to compulsory correction by the people by amendment of the Constitution, was equally unassailable. It seems probable that the framers of the Constitution, in preparing the ratification article, employed a form of expression not quite consistent with the whole scheme. If they had said, "shall be binding between *the people of the states*," the creators of both nation and states, "and between the states and the Union," the

nullification argument would scarcely have had a shred of support in the Constitution itself. It is easy to believe that that is what they meant. When the consequences of the nullification argument were seen to be secession and disunion, the devotion of the people to the Union preponderated the scale in its favor. They finally had to throw the sword into the scale, and amend the Constitution by construing it against the right of secession, if any amendment was needed.

No amendment, however, was needed to confer the power to preserve the Union by force of arms. The love of the people for the Union, and the alarm and passion which a deliberate assault upon it excites, will compass the means to defend and preserve it whether the power is written in the Constitution or not. A constitution is for an established government. The people must maintain the establishment, otherwise the Constitution will be effaced. Nevertheless, the Constitution was made for the people and the states *united* into one power. The original thirteen states made the Constitution, but it in turn made the other states. The Constitution became the parent of more states than existed at its origin. The original thirteen states were practically one in national spirit before they made the Constitution, otherwise they never would have made it. The states subsequently made from the common territory were glad enough to be admitted into the Union. The old state pride and sovereignty of the charter members had little to feed upon in the new states. The spirit of nationality — that common tie, which binds the people of one race, language, customs, country, aspirations, sufferings, history, and liberty, together, — a tie stronger than any constitution, because blood and sentiment are warmer and stronger than law — sent forth the people of the Northern States to bring the southern people back within the common household. There was no other place for them, no other way to do. They had to come back, and in the course of time would have done so. The whip was in the hand, blood was up, but a kinsman's love was inclined to forgive and forget in due time. The question of constitutional right was settled by the sword. Human nature had its course, the wanderers came back, sullen at first, and why not; for who before the smart is gone kisses

the rod that smites him ? But they were glad enough in the end that in some way they were back where they belonged ; sadder but wiser, and burying with time remembrances unpleasant to preserve. The subsequent war with Spain attested the completeness of the reconciliation.

The United States seemed to gain by the compromise which kept South Carolina in the Union, but it really lost. Mr. Calhoun always claimed that South Carolina had caused the United States to back down, and he was right. He devoted a large portion of the remainder of his life to applying his nullification doctrines to the rights of the states respecting slavery and slave extension. He converted the South, and hence the rebellion of later years followed.

We part from Andrew Jackson with this tribute : his denial of the right of South Carolina to secede, his assertion of the power and purpose of the United States to coerce her to submission, furnished a precedent, which made the assertion of the like power and purpose thirty years later less questioned and more authoritative.

Martin Van Buren succeeded Jackson in 1837. He stated in his inaugural address that the Revolution had been achieved at the period of his birth. He was a man of great ability, capable of becoming a statesman, but his associations and aptitudes diverted him into the career of the adroit politician. He engaged early in the politics of his native state, and was apt in acquiring and employing the arts by which shrewd management takes precedence of meritorious service. Rapidly acquiring place and distinction, he had the address to obtain the confidence of Jackson, and to defeat the presidential aspirations of the statesmen, the fulfillment of whose ambition Jackson's advent had already forestalled. With Jackson's favor he became heir in possession of the presidential mantle.

Van Buren professed that he only sought to follow in the footsteps of Jackson. He had to encounter a great financial depression in the country, and the reproach of a national debt which this depression caused. The destruction of the national bank and the insolvency of many other banks, by some of which the treasury lost large sums, led him to propose and procure

the establishment of the Sub-Treasury of the United States. This was an excellent measure. It was bitterly opposed upon party grounds; was repealed, but finally reënacted; and has long stood approved upon its merits. By it the government assumed the care and custody of its own funds. They had hitherto been exposed to loss by the insolvency of the banks in which they were deposited. The complete ascendancy of "machine politics" was achieved in this administration. This fact and the financial distress enabled the newly named Whig party — the party favoring a national bank, internal improvements, a protective tariff, and a broader constitutional construction — to defeat Van Buren and elect William Henry Harrison, who, dying at the close of the first month of his administration, was succeeded by John Tyler. He was the first Vice-President thus promoted.

President Tyler was ambitious to obtain by the votes of the people an extension of the power which accident had accorded him. Originally an Anti-Federalist and Democrat of the straitest school of constitutional construction, — a sympathizer with nullification, and foremost among the champions of state rights, — his very narrowness had forced him into opposition to the expunging resolution which the followers of Andrew Jackson made a test of party fealty, and constrained him to act temporarily with the Whigs of his state. While in this false position, the Whigs made him their candidate for Vice-President. He had no real sympathy with the men or the measures of that party, and when he became President he speedily reverted to his original proclivities. Twice he vetoed their bill to charter the national bank, and by other vetoes prevented their favorite measures from becoming laws. The rupture between him and the Whigs was complete. The Democrats profited by his apostasy, but recognized no obligation to reward it. During Mr. Tyler's administration the annexation of Texas was practically accomplished. It forms an interesting chapter in our history.

The acquisition of the Louisiana territory has already been related. Its western boundary was practically undefined. As acquired by the United States, it probably included the territory

afterwards embraced in the state of Texas. But the United States was at first more anxious about its boundary east of the Mississippi than west of it, and in the treaty with Spain in 1819, by which Florida was acquired, it abandoned its claim to Texas, a claim, however, which Spain had never admitted.

Before 1819 some Americans had attempted to establish colonies in Texas, but the Spanish government slaughtered the colonists and broke up the settlements. In 1806 the Sabine River was provisionally agreed upon as a temporary boundary between the Spanish and American territory. By the treaty with Spain in 1819, by which we acquired Florida, the Sabine River was designated as the true boundary between the two jurisdictions. Mexico revolted from Spanish control in 1821 and declared her independence. Texas and Coahuila together were organized as a Mexican state. Meantime, one Moses Austin had obtained large grants of land, and about 1820 he attempted to organize a settlement. But so many of the people who were attracted thither by his promises were such desperate outlaws that the Mexican government, in 1830, was constrained to forbid any more Americans coming to Texas. Southern statesmen now began to fear that the slave power would ultimately lose its equality in the number of states in the Union if more slave territory should not be acquired, and they lamented the easy indifference with which our plausible claim to Texas under the Louisiana purchase had been flung away. Texas was comparatively uninhabited. About 15,000 Indians were supposed to be sprinkled over its immense expanse of territory. A few Spanish missions had been established. A few Americans remained. These, freed from the restraints of government and civilization, conformed to the savage life of the Indians, and sometimes surpassed them in wickedness and ferocity. The Mexican government was weak, and distracted by revolutionary convulsions. Texas seemed to be one of the fairest portions of the earth, and most abandoned by mankind. It attracted the cupidity of the speculator, and land companies were organized in the United States. They claimed to have obtained by governmental concessions large areas of fertile land, and they sold scrip which gave promise of title to the townships and farms,

which were designated upon the attractive maps of the companies. Adventurers procured this scrip and hurried to Texas, partly to speculate in their supposed acquisitions, and partly to enjoy the wild freedom of the plains. Glowing accounts were given, not altogether destitute of truth, of the bounties of tropical vegetation, of great herds of wild horses and buffaloes, and of the abundance of game. Under the Mexican government slavery was prohibited within its limits.

Among others, whose imaginations were captivated by the charms of Texas, was Samuel Houston. His career was like a romance. Born in Virginia, he spent a portion of his youth as an adopted member of the Cherokee tribe of Indians. Escaping thence as he attained his majority, he studied law at Nashville, served as lieutenant under General Jackson in some of his Indian wars, and became successively a member of Congress and the governor of Tennessee. But while he held the latter office, he suddenly resigned and returned to the tribe of his early adoption. He resumed the Indian dress and methods of life, and in 1833, with painted face and the garb of his tribe, he went to Texas. But he had previously been to Washington, and had held conference with men in high position, with the speculators in Texas lands, and with statesmen who were eager to reannex that abandoned territory to the United States. It soon became apparent that Houston's mission was to direct, as circumstances would permit, the nascent commonwealth on the way to annexation to the United States. Under the influences which he stimulated and fostered, the stream of emigration began to set its current thither. Houston was soon able to organize a convention, which assumed to declare the independence of Texas. Mexico, under Santa Anna, attempted to subdue this revolt against her sovereignty, but in the battle of San Jacinto, in 1836, Houston led his little army of American recruits against the Mexican forces, won the victory, and made Santa Anna his prisoner. Thenceforth Texas maintained the semblance of an independent republic, with a constitution permitting slavery. The United States, which had secretly favored the movement, in 1837 openly acknowledged her independence. From that time down to 1845, Texas was indirectly encouraged

by our government, and her annexation seemed to be near at hand. But Mexico did not renounce her claims to the country, and it was plain that our acquisition of Texas would cost us a war. The slave states were willing to incur the hazard. The purpose of the acquisition being apparent, the North refused to consent.

President Tyler was anxious to accomplish the annexation, notwithstanding the opposing attitude of the North. James K. Polk was nominated for the presidency as the avowed champion of annexation. Circulation was given to the fiction that England was ready to intervene in favor of Texas against Mexico, upon condition that Texas would abolish and prohibit slavery. There were not many slaves in Texas, and the South became alarmed. Clay was the candidate of the Whigs, and did not object to annexation, if it could be accomplished honorably and peacefully.

The anti-slavery party nominated a separate candidate, and diverted votes enough from Clay to elect Polk. Texas was then annexed and admitted to the Union, not by treaty, but by a joint resolution of Congress, which proposed terms and offered advantages which Texas was prompt to accept. This was an irregular exercise of power under the Constitution. Samuel Houston was the first chosen of the senators of the new state.

Under the administration of President Polk, the war with Mexico followed. Our arms were successful, our claim to Texas established, and other territory wrested from Mexico. Thus the march of the empire of freedom went westward to the Pacific Ocean. Time glorifies the result, and gives oblivion to the means. The slavery question thenceforth, and until the close of James Buchanan's administration, dominated all others. The constitutional school of constructionists, who taught that in every question of constitutional power between the nation and the state, the doubt should be resolved against the nation and in favor of the state, following the teachings of Mr. Calhoun, began to construe the Constitution so as to deny to Congress any power to exclude slavery from the territories. The question was of vast importance, especially in view of the accession of the immense territory gained by the annexation of Texas and by the Mexican War.

We reserve the slavery question for the next chapter. Mr. Polk served only one term. He was a man of moderate ability, with a strong propensity to manage his administration with the least possible advice from others. His party did not renominate him. The Whigs now came into power under General Taylor. The Mexican War had made Taylor available. He knew next to nothing about civil administration, and was uncertain before his nomination of his own political sympathies; but after election, he felt that common fairness required him to stand by the Whigs and their measures. He certainly was firmly devoted to the Union, and was earnest in his assertions that, if there should be any need, he would take command of the army himself to preserve it. He died in the second year of his administration, and was succeeded by the Vice-President, Millard Fillmore,—a Whig with pro-slavery proclivities. We need not dwell here upon the administrations of Fillmore, Pierce, and Buchanan. In treating of the slavery question we shall say all that is needful.

With the close of Buchanan's administration we leave the Jeffersonian age of narrow constitutional construction, and enter upon the age of liberal construction,—an age in which the legacy of the teachings of Marshall and Webster becomes incorporated into our constitutional life. How great the slowly pervading influence of Marshall finally became will be explained in a subsequent chapter. The age we leave was one in which the nation practically existed, if not by the sufferance of the states, at least by the concessions of the nation to their jealous protests. The age we enter is one in which the nation boldly claims her own, and the states acknowledge the claim. The just self-respect of both nation and state, and the confidence which each has in the reciprocal justice and support of the other, place each beyond apprehension from the other, and bind all together as respected and respecting members of a vast commonwealth. There is a government of the United States; there is a government of the separate states; the one is as needful as the other, and neither would be the great and useful government that it is without the other.

This is the ripened fruit of time and experience. In 1833

De Tocqueville, that philosophical observer of our institutions, said in his " Democracy in America :" —

" I am strangely mistaken if the federal government of the United States be not constantly losing strength, retiring gradually from public affairs, and narrowing its circle of action. It is naturally feeble, but now it abandons even the appearance of strength. On the other hand, I thought I remarked a more lively sense of independence, and a more decided attachment to their separate governments in the states. The Union is desired, but only as a shadow ; they wish it to be strong in certain cases and weak in all others : in time of warfare it is to be able to concentrate all the forces of the nation and all the resources of the country in its hands ; and in time of peace its existence is to be scarcely perceptible ; as if this alternate debility and vigor were natural or possible. . . . It may be predicted that the government of the Union will grow weaker and weaker every day."

De Tocqueville saw clearly the main features of our system as operated upon a narrow national and a broad state gauge. The decay of the nation which he predicted would have been inevitable if the national gauge had not been broadened. Under the policy of narrow construction, which prevailed from the beginning of Thomas Jefferson's administration until the close of James Buchanan's, the nation was scarcely felt, except in our foreign relations and our foreign commerce. A national bank was twice created, but state jealousy would not suffer it to live beyond its appointed limit of life. Great national roads and other internal improvements were projected, but state jealousy stifled their existence. The African slave trade was declared by law to be a crime, but a nation, intimidated by the states, seldom punished the violators.¹ The solemn judgments of the Supreme Court were more than once thwarted by national subserviency to state domination. The empire west of the Mississippi was nearly lost by a too narrow construction of the Constitution. We point with just pride to the statesmen of that time. Clay, Webster, and Calhoun were great senators. But

¹ The vessels engaged in the slave trade were sometimes seized and confiscated under the acts of Congress.

they constructed nothing. They contended like giants over the limitations of the Constitution. But of what great measure was either the founder? Calhoun may have a claim to the gratitude of posterity for his services in the annexation of Texas. Webster, for the construction of the Constitution, needful for the preservation of the Union. Clay, of all the long line of our statesmen since Hamilton, had the most constructive genius. He proposed measures. He would create, establish, organize. But the Constitution, as it was then construed, stood in his way, and baffled him and defeated his measures. Possibly the constitutional barriers developed their powers. It was an age of the practical settlement of constitutional limitations. Posterity is the wiser for their efforts, and is the heir of the preserved Union.

The constitutional barrier has been by no means broken down; it has been pushed out in some directions far enough for the nation to defend itself and to exercise a fuller measure of its powers. It still stands in the way of all constructive statesmen who seek to create or to find new fields for the national energy. The nation can never do the work of the states, nor the work which the states separately are competent to do. The states have a hundred powers to the nation's one. Mr. Seward recognized the narrow field of the nation for constructive activity. He sought to rescue his name from oblivion by making Alaska his monument. General Grant, enduring as his fame seems to be, turned his eyes towards San Domingo. Mr. Chase revived the scheme of a national bank, and expanded it into a great system of national banks. And yet, it may be gravely doubted whether the nation has any granted power to create and locate a corporation within a state. The power is implied from the aggregate of several granted powers. The usefulness of the banking system as a domestic agency perpetuates it, and the Supreme Court has sanctioned it. The narrow limits imposed by the Constitution for national work no doubt drew to the slavery problem an increased attention. Congress had jurisdiction over the territories and over the District of Columbia, and the right to discuss the subject within conceded limits tempted to excursions into the fields of constitutional exclusion.

The innovator who wishes his new measure to be adopted is still met on the threshold by the challenge of its constitutionality, a challenge which usually suffices to defeat him. The youthful statesman, ambitious of a career of distinction, will, if he enters our national Congress in times of peace, find his highest opportunity for usefulness in protecting the people from unnecessary taxation, and the national treasury from wasteful spoliation. Common sense and inflexible honesty are the qualities the nation needs most. If he prefers his country's interest to his own, he will not regret that the nation has great need for solid, and little need for brilliant, qualities. Nay, he will find cause for congratulation in the fact that the early contentions are settled, and the government securely reposes upon its constitutional powers ; that it is not convulsed by spasms of threatened revolution, nor disturbed by apprehension of instability ; that it performs its functions without friction or tumult, without oppression or the tread of soldiery ; that its demands are few and just, and the welfare of its people the chief object of its care ; that all may rely upon its protection and confide in its justice.

To aid in the administration of such a government may not present a field for ambitious enterprise or constructive energy. The pursuits of private life may afford more opportunities for such qualities. But it is the plain duty of every citizen to do what he can to preserve the government and its administration from decay and corruption, to correct the abuses which creep into official agencies, to counteract the selfish schemes of demagogues and thieves, however disguised under honest forms, and to insist that in polities and in government none but honest ends by honest means shall command the support of honest men. If these objects can be achieved, the United States may without apprehension assume jurisdiction wherever the weaker people of the earth invite it.

CHAPTER XI.

SLAVERY IN THE UNITED STATES.—SECESSION OF ELEVEN SLAVE-HOLDING STATES.—WAR FOR THE UNION.

THE institution of slavery forms a curious and important chapter in our history. A year and four months before the Pilgrims landed at Plymouth, slaves had been landed in Virginia. A Dutch captain commanded the Mayflower. The Pilgrims engaged him to take them to the shores of Hudson's River. But the Dutch, fearing thus to lose that territory, bribed him to take them a safe distance to the northward.¹ It was a Dutch captain, too, who first brought slaves to Virginia. Thus, the Dutch were the carriers of the institution, and of the race which subverted it. Slavery is among the oldest of human institutions. No record of human government so old but that slavery is yet older. The Christian religion, after centuries of struggle, becomes its final conqueror. The conquest would not have been so long delayed but for the struggle between the followers of Christ and of Mahomet. The Christian religion teaches the equality of all. "God is no respecter of persons." "As ye would that men should do to you, do ye even also to them likewise." The Mahometan religion teaches that all true believers are equal in the eye of God and his Prophet; that all others are infidels and enemies, fit for death or captivity. Hence to hold the Christian in slavery was a pious duty. The Christian felt forced to retaliate, and when the follower of the Crescent became his captive, he also became his slave. He thus punished the enemy of the Cross and enjoyed the spoil of Christian conquest.

The Mahometan Moor of the western empire was not slow to suggest to his Christian conqueror that he would ransom himself from captivity by substituting the blackamoor, the pagan

¹ Grahame's Colonial Hist., i. 144.

negro, in his stead. The Christian thought it better to have a faithful slave than a treacherous one. Thus, the blackamoor became the coin in which the Mahometan Moor redeemed himself from Christian captivity. And the negro, who knew naught of either faith, was sacrificed by the votaries of one to appease the greed and vengeance of the other.

But Christian merchants soon found that they could capture negroes as well as make exchanges for them. The ignorance and helplessness of the negroes made them the spoil of mankind. If there had been no struggle between the Cross and the Crescent, it is possible there would have been no slaves in America.

Be this as it may, the framers of the Constitution found the institution in existence, recognized by law, and tolerated, if not sanctioned, by the people of the several states. Its introduction was in violation of the English law; not as it was then understood, but plainly so, as it was afterward ascertained. In 1771 a slave named Somerset was taken by his master from Virginia to England. The slave refused to serve his master there. A writ of *habeas corpus* was issued by Chief Justice Mansfield, and the question whether Somerset was free or slave was brought before the full court. The court declared him free, and held that slavery was contrary to the laws of England, because positive law was necessary to establish a condition of slavery, and England had made no such law. This decision inspired Cowper's lines: —

“Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free:
They touch our country and their shackles fall.”

By the common law, by the laws of England which the colonists inherited, by the limitations of their charters which forbade them to make any laws repugnant to the laws of England, the colonists neither had nor could rightfully make any laws sanctioning slavery. But before the force of the decision in the Somerset case could be fully perceived, or effect given to it, the colonies threw off their allegiance to England and became sovereign states. Sovereign states could legalize slavery.

That positive law was necessary to authorize slavery was

recognized by the clause in the fourth article of our Constitution, “No person held to service or labor in one state *under the laws thereof.*” Slavery was first established in this country in opposition to any valid law; certainly in opposition to that natural law which affirms the equality of right to personal liberty. The English, Dutch, and Spanish were slave-traders at the beginning of the seventeenth century. Africa was the breeding-ground of slaves; and the English, French, and Spanish kings entered into treaties to assure to themselves the monopoly of this traffic. In these treaties negroes were spoken of as measurable by weight; thus, *a ton of negroes*, as we would say a ton of iron or coal. Spanish colonization preceded the English upon this continent, and slavery was already established in the Spanish settlements when the English colonization began. It is said that slaves were first introduced into the English colonies from Barbadoes. In August, 1619, a Dutch man-of-war touched at a settlement in Virginia, and exchanged twenty slaves for provisions. With kings making treaties to further the slave trade, with slaves in the neighboring Spanish provinces, and with the desire to obtain cheap labor, it probably did not occur to the colonists that it was a violation either of law or of morals to purchase these savage heathen, and compel them to submit to the domination of Christian masters. The Levitical law declared: “Both thy bondmen and thy bondmaids, which thou shalt have, shall be of the heathen that are round about you; of them shall ye buy bondmen and bondmaids.” The further introduction of slaves seemed to follow as the result of lawful trade. Thus, slavery was at first permitted, probably, by the indifference of feeble communities, afterwards tolerated by custom, and finally sanctioned by colonial law. In our treaty with Great Britain by which our independence was acknowledged, the phrase occurs, “negroes, or other property.”

We should be unjust if we judged the conduct of the early colonists by the moral standards of our own time. The slave, as he was brought here from his native land, seemed to present small claims to be considered as the equal in right of the white man. He had the form of a man, but not his intelligence. He

was obedient and docile, and was supposed to rest under the curse denounced against Canaan: "A servant of servants shall he be unto his brethren." His contact with civilization disclosed his latent intelligence, and his emotional nature readily yielded to the teachings and influence of the Christian religion. When the white man became the parent of the Christian mulatto, the argument lost half its support; and when the slave professed Christianity, the argument which condemned the heathen to bondage was gone. But selfishness obviated the legal, if not the moral difficulty, by procuring the enactment of laws, that once a slave always a slave, and that the condition of the negro child, whether free or slave, should follow that of its mother, and not, as with the white child at the common law, the condition of its father. Thus the succeeding generations of colonists were constrained to tolerate an institution which developed injustice and cruelty, not foreseen by their ancestors. Their morality took its tone from the conditions they inherited. Whatever may be the ideal standard of morals, the practical one must be largely formed by the conditions of its time and place. The nineteenth century closes with a standard different from the one with which it opened. The century has been great in great achievements. The abolition of human slavery throughout the civilized world is the greatest of them all, and perhaps the greatest of all the centuries. The century began with slavery not only in the United States, but also in nineteen English colonies, in those of France, Holland, Denmark, and Sweden, in the Spanish and Portuguese colonies of South America, and with the serfdom of the peasant classes in Russia. It ends with slavery and serfdom abolished in all of them. Brazil was the last American nation to abolish slavery. This was done in 1888. There is probably now more slavery in Africa than upon all the other continents. The colony of Rhode Island prohibited slavery as early as 1652, but the prohibition was long practically disregarded. The Quakers in Pennsylvania protested against it in 1688. The Swedes at first prohibited it in Delaware, but the Dutch admitted it. The Duke of York's charter for New York, in 1665, prohibited the slavery of Christians, and thus by implication favored that of heathens.

Long before the Declaration of Independence, many lamented the existence of slavery as both a wrong and a disaster. Montesquieu, in the early part of the eighteenth century, eloquently attacked the institution.¹ Jefferson was his pupil, but he was also convinced by his own observation that slavery ought to be abolished, and he made no concealment of his convictions.² In the original draft of the Declaration of Independence, Jefferson wrote the following charge against George the Third and against slavery : —

“ He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, capturing and carrying them into slavery in another hemisphere, or to incur a miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian king of Great Britain. Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce.”

This paragraph was stricken out by the committee before the document was submitted to Congress. It would have been impolitic for the convention which framed the Constitution to

¹ Patrick Henry, in 1773, undoubtedly expressed the sentiments of many amiable men. He wrote : “ Is it not amazing that, at a time when the rights of humanity are defined and understood with precision, in a country above all others fond of liberty, in such an age we find men, professing a religion the most humane, mild, meek, gentle, and generous, adopting a principle as repugnant to humanity as it is inconsistent with the Bible and destructive of liberty ? Every thinking honest man rejects it in speculation, but how few in practice from conscientious motives. . . . Would any one believe that I am master of slaves of my own purchase ? I am drawn along by the general inconvenience of living without them. I will not, I cannot, justify it ; however culpable my conduct, I will so far pay my devoir to virtue as to own the excellence and rectitude of her precepts, and lament my want of conformity to them. . . . We owe to the purity of our religion to show that it is at variance with that law which warrants slavery. . . . I could say many things on this subject, a serious view of which gives a gloomy prospect to future times.” (Bancroft, vi. 416, 417.)

² “ The President (Monroe) said that in Virginia the feeling against slavery was so strong that shortly after the close of our revolutionary war persons had voluntarily emancipated their slaves, but they had introduced a class of very dangerous people, the free blacks, who lived by pilfering and corrupted the slaves, and produced such pernicious consequences that the Legislature was obliged to prohibit further emancipation by law.” (J. Q. Adams’s Diary, iv. 293.)

attempt to transfer from the states to the United States the control of the institution of slavery. It was regarded as a domestic institution, to be regulated or prohibited by every state in the exercise of its reserved sovereignty. Its regulation or control was not one of the objects for which the Constitutional Convention was thought to be necessary. Enough, however, was said in the convention by many northern delegates to show that they strongly condemned the institution. They were successful in keeping the word "slave" out of the instrument, but what was put in it was intended to exempt slavery from invasion by the Union, and to strengthen the institution. Mr. Chief Justice Taney, speaking for the majority of the United States Supreme Court, in 1857, in his opinion in the celebrated Dred Scott case,¹ said:—

"The right of property in a slave is distinctly and expressly² affirmed in the Constitution. The right to traffic in it like an ordinary article of merchandise and property was guaranteed to the citizens of the United States, in every state that might desire it, for twenty years. And the government, in express terms, is pledged to protect it in all future time, if the slave escapes from his owner. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights."

These assertions of the Chief Justice were based upon the provisions of the Constitution which forbade Congress to prohibit, prior to 1808, the importation of slaves, and which provided that "no person held to service or labor in one state, *under the laws thereof*, escaping into another, shall, in consequence of any law or regulation therein, be discharged from

¹ 19 How. 393.

² Mr. Lincoln in 1858 said: "An inspection of the Constitution will show that the right of property in a slave is not 'distinctly and expressly affirmed' in it. Bear in mind, the Judges do not pledge their judicial opinion that such right is *impliedly* affirmed in the Constitution; but they pledge their veracity that it is *distinctly* and *expressly* affirmed there — 'distinctly,' that is, not mingled with anything else; 'expressly,' that is, in words meaning just that without the aid of any inference, and susceptible of no other meaning." (The italics are Mr. Lincoln's.)

such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." As "by the laws thereof" slavery might exist in any state, and as there was reserved to the states, or to the people, the powers not delegated by the Constitution to the United States, and as no power was delegated to the United States to interfere with the state laws favoring slavery, it followed that the United States could do nothing to prohibit slavery in any state. And it followed that, as by the Constitution the fugitive slave must be delivered up, Congress, which had power "to make all laws necessary and proper for carrying into execution all powers vested by the Constitution in the government of the United States," had power to make the Fugitive Slave Law. It also followed that the general government under the Constitution had no power to mitigate the institution of slavery in the states, since no such powers were delegated to it, but did have power to make the condition of the slave more onerous and hopeless, since the power to pass laws to cause him to be delivered up was delegated to it. Because it was so, the Abolitionists were sometimes moved to say that the Constitution was a "covenant with Death and an agreement with Hell."

Indeed, the provision in the Constitution for the delivering up of fugitive slaves escaping from one state into another — from a state where, by the laws thereof, he was lawfully a slave to a state where, by the laws thereof, he was lawfully free — was one of the strongest commendations of the instrument to the slave-owners. It gave additional security and protection to their property in slaves. It was a guarantee of a right of property in fugitive slaves wherever they might be found in the Union.

Charles C. Pinckney said, in the convention of South Carolina, in advocating the ratification of the Constitution, "We have obtained the right to recover our slaves in whatever part of America they may take refuge; which is a right we had not before." It is significant that the Articles of Confederation said nothing upon the subject.

The opinion of Chief Justice Taney may be further quoted. He was contending for the proposition that the negro could not

be a citizen of the United States, and that he was not within the meaning or intent of any of the provisions of the Declaration of Independence, the Articles of Confederation, or of the Constitution, respecting citizenship or liberty. Had he confined his remarks to the slave¹ instead of extending them to all persons of African descent, the denunciation of which he was the object, from 1857 down to our own times, would probably have been less violent.

"It is difficult," he said, "at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. They had more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound

¹ In his Supplement to the Dred Scott Opinion, dated September, 1858 (Tyler's Memoir of Chief Justice Taney, Appendix, 578), the Chief Justice says:

"The Supreme Court did not decide the case upon the ground that the slavery of the ancestor affixed a mark of inferiority upon the issue which degraded them below the rank of citizens. It stated the enslaved condition of the whole negro race at the time the Constitution was formed as a well-known historical fact, in order to show the meaning of the words used in that instrument. The argument in the opinion rests, not upon the actual condition of the ancestors of the plaintiff as to freedom or slavery, but is placed altogether upon the condition of the race to which he belonged, and upon the opinions then entertained by the white race universally, in the civilized portions of Europe and in this country, in relation to the powers and rights which they might justly and morally exercise over the African or negro race. . . .

"And as the Constitution of the United States was framed and adopted in that state of public opinion and of public law, the court held that it must be construed with reference to the description of persons by whom and for whom it was made, and with reference also to the principles and opinions upon which they at that time habitually acted in all the relations and duties of life, public and private; and consequently, that the provisions contained in it for the security and protection of individual liberty, and conferring special rights and privileges in certain cases upon citizens of different states, could not fairly be construed to embrace a description or class of persons whom they regarded as inferior and subordinate to the white race, and in the order of nature made subject to their dominion and will, and whom they were accustomed to buy and sell like any other property.

"The opinion on this point authorizes no distinction between persons of the negro race, whether their ancestors were held in slavery or not. The historical fact as stated by the court, and upon which the decision rests, applies equally to the whole race."

to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute ; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."

Mr. Madison, in the forty-third number of "The Federalist," speaking of possible domestic violence, and referring to that provision of the Constitution which requires the United States to guarantee to every state in the Union a republican form of government, and to protect it from invasion and domestic violence, says a minority of citizens may become a majority of persons by accessions from aliens and others not admitted to suffrage, and adds : —

"I take no notice of an unhappy species of population [meaning slaves] abounding in some of the states, who, during the calm of regular government, are sunk below the level of men ; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves."

This is a remarkable paragraph, at once a description of the slave as he was, and a prophecy of what he was to become.

We may at least believe that at the time of the adoption of the Constitution, the idea had not entered the minds of the people that the new government would have anything to do with slavery, except to suppress the slave trade after 1808, and to compel the return of fugitive slaves.¹ The influence of the Constitution upon the slavery agitation will be the better understood by more closely observing the peculiar provisions of

¹ A Boston newspaper, a few days after Washington's first inauguration, reminded the Anti-Federalists that, under the new Constitution, two runaway negro boys had been apprehended in that city and returned to their masters.

the Constitution itself. The non-intervention by Congress with slavery in the states was so clearly deducible from its provisions, from its omissions, and the declaration of the tenth amendment as to the effect of such omissions, and from its history, that it seemed incontestable.

But in truth there lurked in the provisions of the Constitution a denunciation of slavery and a latent power of intervention which the stress of the conflict brought to light. First, Congress had the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, and therefore could prohibit slavery in the district. Second, it had power to make "all needful rules and regulations respecting the territory or other property belonging to the United States," and therefore could prohibit the extension of slavery into such territory while in a territorial condition, and thus withhold from slave property the circulating quality of other property. Third, the Constitution by its sixth article assumed "the engagements entered into before the adoption of the Constitution;" one of these was the "engagement" with Virginia validating the ordinance of 1787 for the government of the Northwest Territory, in which the "engagement" was that "neither slavery nor involuntary servitude, otherwise than in the punishment of crimes," should exist in the territory or the states to be formed out of it. Congress kept this engagement on its part and exercised the power of intervention while the territorial condition existed, and this intervention prevented the establishment of slavery in any of the states formed out of that territory. If the Constitution authorized the exclusion of slavery in this part of its jurisdiction, then it recognized the wrongful nature of the institution, and the essential difference between the quality of "human chattels" and other property. Fourth, the importation of slaves could be prohibited by Congress after 1808. This provision was an implied accusation of the institution. Fifth, Congress could make no law "abridging the freedom of speech or of the press." This freedom was the gateway through which practical intervention could be made. The United States was the constitutional mail carrier, and thus could not avoid becoming the disseminator of the utterances against slavery, and

to this extent the ally of its enemies. Sixth, the third section of the fourth article which provided for the surrender of fugitive slaves contains the implication that a slave "in one state under the laws thereof" might become free in another state "in consequence of" some "law or regulation therein," if he should come into the latter state otherwise than by "escaping." Seventh, the second section of the fourth article declared that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Constitution left citizenship undefined except through naturalization and by vague suggestion. Any state could make the enfranchised slave within its borders its citizen, and thus interpose the shield of the Constitution of the United States between him and the laws of the slave state to which he might migrate. Eighth, three fifths of the slaves were counted in apportioning the representatives in Congress. Nothing could be more absurd than such an exact fractional mixture of manhood and chattelhood.

The Constitution was therefore the guardian of slavery in the states which "by the laws thereof" established it, and at the same time it condemned it by implication and inference, forbade it in the Northwest Territory, permitted its abolition in the District of Columbia, its non-extension into the territories, and made the government through the mails the motive power for the shafts directed against it by free speech and a free press. It hinted at a possible way for the slave to become free, and by the action of a state, its citizen, thus enabling him to enjoy in a slave state the privileges and immunities of citizenship. These provisions reflected the conditions and influences of the time the Constitution was framed. Non-intervention through silence was the theory. No slave code was to be enacted. These provisions were proposed one by one and accepted in that spirit of compromise which sought to conciliate every jealous interest. Probably nobody perceived their indirect contravention of the main scheme. The Supreme Court in the Dred Scott case sought to establish their compatibility with non-intervention, but a generation younger than the judges reversed its decree. Moulded and wielded by the spirit of the civilization of the

nineteenth century, this incongruous assemblage of discordant provisions hastened the pace of universal emancipation.

At the first Congress the Pennsylvania Society for promoting the Abolition of Slavery presented a petition asking that slavery be abolished. This petition was signed by Benjamin Franklin as president of the society.

Congress replied as follows: "That the Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them in any of the states; it remaining with the several states alone to provide any regulations therein which humanity and true policy may require." The same page of Benton's "*Abridgment of the Debates of Congress*"¹ which records this reply of Congress also records the death of Benjamin Franklin. Consistent to the end, this steadfast friend of humanity pauses before the open portals of death to knock in behalf of the slave on the portals of freedom. The Quakers, and others, presented similar petitions to this and subsequent sessions of Congress, but it never receded from its first reply.

In 1793 the first Fugitive Slave Law was passed. About the time of the adoption of the Constitution a colored man was seized by several persons in Pennsylvania, and forcibly carried into Virginia with intent to enslave him. The laws of Pennsylvania made this act a crime, and the kidnappers were indicted. But they fled to Virginia, and the governor of the latter state refused to surrender them. The correspondence between the governors, and the papers relating to the case, were transmitted to President Washington by the governor of Pennsylvania with the inquiry how the constitutional provision respecting fugitives from justice could be made effective. The President laid the matter before Congress. The result was that bills with respect to fugitives from justice and fugitives from slavery were passed. No debate occurred in the House. The

¹ Vol. i. p. 239. In the debate preceding the adoption of this resolution, Mr. Jackson of Georgia, replying to Mr. Scott of Pennsylvania, said (Ib. 209): "The gentleman says if he were a Federal Judge, he does not know to what length he would go in emancipating these people; but I believe his judgment would be of short duration in Georgia; perhaps even the existence of such a judge might be in danger." This is an early specimen of a southern tone of speech which afterwards became more pronounced.

Senate at that time sat with closed doors, and continued to do so until February 20, 1794; whether any debate occurred there is not known. Probably there was none, as the propriety of giving effect to the constitutional provision could not well be contested. The Fugitive Slave Bill did not attract public attention till long afterwards. It provided that the owner of the fugitive might seize him and take him before any federal judge, or before any local magistrate of the state, and the magistrate should order that he be delivered up to his master, if satisfied that the master's claim was valid. Afterwards, when public sentiment became aroused, it was objected that the state officer was enjoined by the United States to perform certain duties, and finally, in 1842, the Supreme Court of the United States substantially held that Congress had no power to require any official service of a state officer.¹ Several states thereupon passed acts, forbidding, under severe penalties, the rendition by their officers of the services required by this act, and providing that the fugitive slave should have the privilege of the writ of *habeas corpus* and of trial by jury.

It was the hope of benevolent men in the earlier years of the government that the states would ultimately abolish slavery of their own accord. The Northern States did this: Vermont by her first Constitution in 1777, Massachusetts in 1780, and New Hampshire in 1783. Gradual abolition was ordained by Pennsylvania in 1780, by Connecticut and Rhode Island in 1784, by New York in 1799, and New Jersey in 1804. Slavery wholly ended in New York July 4, 1827.

Societies to promote gradual abolition were formed in several of these states near the close of the last century. It was hoped that the same influences would prevail in the Southern States. But the sudden and enormous development of the production of cotton made slave labor so profitable that selfishness prevailed over humanity. The cotton gin invented by Whitney in 1793 cleaned 350 pounds of cotton per day. Before the inven-

¹ *Prigg v. Pennsylvania*, 16 Peters, 539. In this case it was said, "In a state where slavery is allowed, every colored person is presumed to be a slave." The court further held that under the Constitution, the slave-owner could seize and recapture his slave in whatever free state he found him, the law of the state to the contrary notwithstanding. See *Moore v. People of Illinois*, 14 Howard, 13.

tion a man would spend a whole day in cleaning a single pound. This remarkable invention put an end to the hope of voluntary abolition in the cotton states.

In 1816 the American Colonization Society was formed. Its object was to promote emancipation by colonizing the free blacks in some distant colony, and to remove them from the slave states. The Virginia legislature in 1816 commended the movement to the favor of the general government. It was warmly supported by Jefferson, Madison, Monroe, Clay, and other eminent men at the South, and had branches in every northern state. Under its patronage was formed the colony, now the Republic of Liberia, on the western coast of Africa. The society still exists, its present purpose being to help sustain the feeble but interesting Liberian Republic. Its influence in abolishing slavery was the indirect one of leading many of its members through the gate of colonization into the fold of the abolition party.¹

Of the thirteen original states of the Union seven became free and six slave states. Care seems to have been taken to admit new states in pairs, one free and one slave. Thus, Kentucky and Vermont, Tennessee and Ohio, came in nearly together.² Louisiana, carved from the French purchase, restored equality. Then Mississippi and Indiana, Alabama and Illinois, still maintained the equilibrium. Not till Missouri in 1818 applied to be admitted as a slave state was the subject of slavery much discussed, and then finally Maine was admitted

¹ "There are men of all sorts and descriptions in this Colonization Society : some exceedingly humane, weak-minded men, who have really no other than the professed objects in view and who honestly believe them both useful and attainable ; some speculators in official profits and honors which a colonial establishment would of course produce ; some speculators in political popularity, who think to please the abolitionists by their zeal for emancipation, and the slave-holders by the flattering hope of ridding them of the free colored people at the public expense ; lastly, some cunning slaveholders who see that the plan may be carried far enough to produce the effect of raising the market price of their slaves." (J. Q. Adams's Diary, 1819, iv. 292.)

"I had with regret made up my opinion that the object of the society was impracticable to any considerable extent, and that so far as it would be practicable it would be productive of evil more than of good." (Ib. 356.)

² During the Revolution Vermont repeatedly sought admission as a state into the Confederacy, but was refused until a state should be ready for admission from the southern section.

as the companion state. Afterwards Arkansas and Michigan, Florida and Iowa, were received in pairs, one slave and the other free.

Before the Constitution was adopted, New York, Massachusetts, Connecticut, Virginia, and South Carolina ceded to the United States the large tracts of western lands to which they respectively made claim. These cessions were made, both to conciliate the other states, and to place the proceeds of their sales at the disposal of the United States in payment of the debts incurred by the war.

Virginia surrendered to the confederacy all her claims to the territory lying northwest of the Ohio River. On the 13th of July, 1787, while the Constitutional Convention was in session, the confederate Congress adopted an ordinance for the regulation and government of this territory. This ordinance provided that when the population should justify it, the territory should be formed into states, not less than three nor more than five, and that each state should be admitted into the Union upon the same footing as the original states. It provided that there should be neither slavery nor involuntary servitude in the territory otherwise than as punishment of crimes. This ordinance was a compact between Congress and the state of Virginia, and also by implication between Congress and the people who should thereafter settle in the territory. The Constitution made it binding upon the United States, which succeeded to the "engagements" of the confederacy. It was reenacted by the first Congress under the Constitution, and was believed to be inviolable.

This ordinance had the force of a constitutional enactment. It excluded slavery from the states northwest of the Ohio, and its moral effect was constant and wide-reaching. It signified to the minds of many that, in the early judgment of the states, South as well as North, slavery was wrong in itself; that however circumstances might excuse it where it was inherited, the area of its existence ought not to be extended. When North Carolina came into the Union in 1790, she ceded to the United States the territory afterwards forming the state of Tennessee, but with the proviso, which Congress accepted, "that no regu-

lations made or to be made by Congress shall tend to emancipate slaves." The first Congress soon after provided for the government of the territory south of the Ohio, and adopted the North Carolina proviso.¹

Georgia in 1802 ceded her back country now comprised in the states of Alabama and Mississippi, with substantially the same proviso. The Supreme Court in the Dred Scott case declared that the Ordinance of 1787 was in excess of the powers of the confederacy, and ceased to be of binding force upon the ratification of the Constitution. This declaration of the court was popularly regarded at the North as one of the great heresies of that famous decision. It has, however, been repeatedly held by the court,² that upon the admission of any part of the territory as a state the restraints of the ordinance cease. This results from the admission of the new state "upon an equal footing with the original states in all respects whatever."

The five states which were formed out of the Northwest Territory came into the Union as free states; but the territory south of the Ohio made only four, namely Kentucky, Tennessee, Alabama, and Mississippi. Thus the Ohio River to its junction with the Mississippi was the dividing line between slave and free territory. West of the Mississippi River, at the time of the adoption of the Constitution, the territory belonged to Spain. It extended to the main range of the Rocky Mountains, and possibly further, since the country was not then sufficiently known to give it a precise boundary, except by adopting a degree of longitude. South of the thirty-first parallel of latitude, the territory from the Atlantic to the Mississippi then also belonged to Spain. The methods by which we acquired these territories, including Texas, New Mexico, and California, have been already detailed.

The Oregon country we acquired partly by discovery, partly by occupation, and finally by treaty. In the same year in which the Constitutional Convention sat in Philadelphia, two vessels, the Columbia and Washington, were sent from the port

¹ See *Clinton v. Englebrecht*, 13 Wallace, 434, for a history of the organization of territories.

² *Huse v. Glover*, 119 U. S. 546.

of Boston by a company of adventurers, to circumnavigate the globe, explore the eastern coast of the Pacific, trade with the savages of the Sandwich Islands, and with the merchants of the Celestial Empire. In the course of their exploration upon the Pacific coast, they entered the mouth of a great river, which we now know has its headwaters on the western slopes of the Rocky Mountains. The captain named it Columbia, after one of his vessels. This is the foundation of our claim to our possessions upon the Pacific coast. Lewis and Clarke, in 1803, under the patronage of President Jefferson, explored the Columbia River from its sources in the mountains to its mouth upon the ocean. In the Florida treaty of 1819 Spain transferred to us whatever claim she had to the northwest coast. If France ever had any claim, she sold it to us in our Louisiana purchase.¹

John Jacob Astor established a fur-trading post there in 1811. England, however, contested our title. She claimed priority of discovery of the country tributary to the Columbia River on its northerly side, but the fact was, her discoveries were five hundred miles north of that river. Mr. Astor was driven out in the war of 1812, and the Hudson's Bay Company took possession. A treaty with England in 1818 allowed England and the United States joint occupation, and postponed the boundary question. But in 1846 our title was recognized and the boundary defined, not so far to the north as we had claimed, but upon the forty-ninth parallel. This parallel was adopted because in the treaty of Utrecht, made between France and England in 1713, it was constituted the boundary between the English and the French possessions west of the Lake of the Woods, then the westernmost locality known east of the Pacific. The territory of Florida and that vast region extending from the Mississippi River to the Pacific Ocean became part of the United States.

In 1812 the state of Louisiana was admitted into the Union. This was the first state that came in from the acquired territory. That an additional slave state was proposed to be added did not much engage public attention. The

¹ *Shively v. Bowlby*, 152 U. S. 50.

Federalists in Congress opposed its admission upon the ground that the Constitution was framed and the Union organized for the benefit of the original thirteen states and of the states that might be formed out of the territory then possessed by the United States ; not including any that might thereafter be acquired. They contended that the framers of the Constitution did not intend that the original states, and those to be formed within their territory as then possessed, should enter into any partnership with new states to be formed out of conquered or purchased territory ; the Constitution was for the benefit of the people of the United States, not of Louisiana ; the introduction of new states from this immense western territory would result in overwhelming the original states by their numbers, power, and influence, and would subject the rights and liberties of the old to the power and consideration of the new ; the old never contemplated such a union ; they never agreed to it ; they would not submit to it. Mr. Quincy of Massachusetts said in Congress : “ It is my deliberate opinion that if this bill passes, the bonds of this Union are virtually dissolved ; the states which compose it are free from their moral obligations ; and that, as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation, amicably if they can, violently if they must.” The bill passed. A territorial government was also framed for the country lying north and west of Louisiana.¹

In 1818 the people of this territory, lying north of $36^{\circ} 30'$, applied for admission as a state. Slavery already existed there. Its eastern boundary extended northward along the Mississippi, far above its junction with the Ohio. Thus if slavery should be established in the new state, it would go northward upon the territory acquired from France, far above the line

¹ “ The Louisiana purchase was in substance a dissolution and recombination of the whole Union. It made a Union totally different from that for which the Constitution had been formed. It gives despotic powers over the territories purchased. It naturalizes foreign nations in a mass. It makes French and Spanish laws a part of the laws of the Union. It introduces whole systems of legislation abhorrent to the spirit and character of our institutions, and all this was done by an administration which came in blowing a trumpet against implied powers.” (J. Q. Adams’s Diary, 1821, v. 401.)

which marked its northern limit in the Northwest Territory, east of the Mississippi.

It was moved that the admission of Missouri be made dependent upon the conditions that the further introduction of slaves be prohibited, and that all slave children born after the admission should become free at the age of twenty-five. The discussion over the admission was prolonged for more than a year. It was contended on the part of the prohibitionists that, under the provision of the Constitution, "new states may be admitted by Congress into this Union;" the power to admit implied the power to impose the conditions of admission. On the other hand it was contended that upon the admission of a state it became the equal in right of every other state, and therefore the proposition to admit a state was necessarily a proposition to admit without any restriction whatever. This position was fortified by a provision of the treaty by which the territory of Louisiana was acquired by the United States. This declared that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of the rights of citizens of the United States." Any restriction upon their right to hold slaves, it was argued, would therefore be an infringement of their rights under this treaty. To which the reply was, that the right to hold slaves was not a right of a citizen of the United States, but only the right of the citizen of such states as "by the laws thereof" allowed slavery. Pending the discussion Maine applied for admission, and the South determined to keep Maine out unless Missouri should be admitted without restriction. It was finally provided as a compromise of the difficulty that slavery should be prohibited forever north of $36^{\circ} 30'$ in the territory outside of Missouri, and that the state be admitted without restriction. This compromise prevailed, and many supposed that the slavery question was settled forever.

President Monroe, however, hesitated for a time to sign the bill. He asked his cabinet two questions: First, Has Congress power to prohibit slavery in a territory? Second, Does the term "forever" extend beyond the territorial condition and

apply to the subsequent state? The cabinet answered Yes to the first question, and divided upon the second. The question was then changed to the inquiry, Is the bill constitutional? which all answered Yes, and thus postponed the disputed question to the next generation.

The fact was, that the discussion of the Missouri question, and the manner in which it was disposed of, led a few men to think deeply upon the subject, and prepared others to unite with the abolition societies which were subsequently formed. The pioneer Abolitionist was one Benjamin Lundy. The Missouri question stirred him profoundly. In 1821 he commenced the publication of a paper styled the "Genius of Universal Emancipation." He was moderate in his methods, and sought by moral forces to achieve the freedom of the slaves. He conceived the idea of finding a refuge for them in Texas or Mexico, and colonizing them there. In 1829 William Lloyd Garrison became associated with him as publisher of this paper. Garrison, however, soon wearied of the moderate methods of Lundy, and he left him and established "The Liberator." The tone of this paper was extremely radical. It took the position that slavery was a crime; and because a crime, no toleration should be accorded it, and no compromise made with the slaveholders, whom it denounced as criminals. Garrison had the qualities of which martyrs are made. In season and out of season, in spite of mobs who threatened his life and property, he prosecuted his work; seeking personal safety by disguise, by concealment, once by imprisonment in jail, and sometimes by flight, crying aloud and sparing not, from about 1830 to the outbreak of the civil war. Here and there friends began to gather around him. Some were convinced by his arguments, others yielded to his exhortations; some were gained by his lofty spirit, which defied danger and persecution, others by the intolerance which denied him freedom of speech. Many sympathized with him in secret, and wished his cause the success they had not the courage to avow. A few northern pulpits ventured to pray that the slave might become free. The sinfulness of slavery began to take hold of men's consciences. In January, 1832, the New England Anti-Slavery Society was formed; its

avowed purpose was immediate abolition. In December, 1833, the "American Abolition Society" was formed. Other abolition societies followed.¹ The term "Abolitionist" was used by their enemies as a word of reproach. These societies met with the condemnation of most of the churches, of the magistrates, the legislators, the political parties, and the mob.² Their meetings were often dispersed by violence. Some of the societies were as radical as Garrison himself, and demanded immediate abolition; others employed more moderate methods and hoped that moral and religious influences would accomplish the result. They were reproached because of their omission to recommend compensation to the owner of the slave for his loss of property. "Why not be virtuous at your own expense?" was often sneeringly asked. Such a question had no weight with those who denounced slavery as a crime. To the objection that the Constitution sanctioned slavery in every state whose laws admitted it, the answer finally was made, and met with wide acceptance, "There is a Law higher than the Constitution." By some this was understood as referring to the binding force of the Christian religion, which taught the common brotherhood and equality of man. With others the argument was that the Constitution

¹ In December, 1833, there were three hundred and fifty anti-slavery societies. (Jay, *Misc. Writ.*, 368.)

² Elijah P. Lovejoy was the first martyr to the cause. In 1833 he published the *Observer* at St. Louis, Mo. This was a religious paper, in which paragraphs hostile to slavery occasionally appeared. In 1836 a negro criminal was taken from the jail in St. Louis by a mob, chained to a tree, and burned to death. An attempt being made to indict the authors of the crime, the judge charged the jury that if the accused had been hurried by some "mysterious metaphysical and almost electric frenzy" to commit the crime, they should not be indicted. Lovejoy commented with proper severity upon this charge, and the mob destroyed his printing-office. He thereupon moved to Alton in Illinois, a few miles from St. Louis, and attempted to establish his paper there. The mob destroyed his press. He made a second attempt, and his press was again destroyed. By this time the public excitement was great, one party determined that he should succeed, and the other that he should fail. He obtained a third press, and while attempting with others to defend it, he was shot and killed. The event caused great excitement throughout the Union, some justifying and honoring Mr. Lovejoy, and others denouncing him and declaring that he had "died as the fool dieth." His brother, Owen Lovejoy, afterwards a member of Congress, was extreme in his bold and passionate denunciation of slavery. Upon one occasion, long before the war, he said in Congress that the slaves were destined to march to emancipation as the children of Israel had journeyed to the promised land, "through the *Red Sea*."

was based upon the Declaration of Independence, "that all men are created equal and endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men." The Constitution instituted a government to secure these rights. If it failed to express this security, the Declaration of Independence, the higher law, supplied it.

The authorities sought to palliate their inefficiency by denouncing the persecuted Abolitionists as incendiaries. The southern press advised that unless the Abolitionists should be suppressed, the southern trade be withheld from the North. The complaisance of most of the northern merchants was extreme, but there were notable exceptions. The legislatures of several of the Southern States requested those of the Northern States to pass laws to prohibit further discussion and agitation. Some northern legislatures exclaimed against the Abolitionists, but none passed any repressive laws. Indeed, freedom of the press and of speech, unless libelous, seditious, or immoral, was guaranteed by the state constitutions, and could not be abridged by Congress.

The South took alarm. The immediate result was to make the condition of the slave more deplorable. The South began to fear that one of the purposes of the Abolitionists was to provoke an insurrection of the slaves, and to lead them to seek their liberty by a massacre of their masters. Laws were passed making it a crime to teach the slave to read, forbidding any religious meetings among them except in the presence of slaveholders, and prohibiting the circulation of any anti-slavery papers through the mails.¹ The South made an effort to have the United States close the mails to such publications. Presi-

¹ The publisher of the *Emancipator*, issued in New York, was indicted in Alabama for circulating in that state through the mail a copy of his paper containing these words: "God commands and all nature cries out that man should not be held as property. The system of making men property has plunged two million two hundred and fifty thousand of our fellow countrymen into the deepest physical and moral degradation, and they are every moment sinking deeper." The governor of Alabama issued his requisition upon the governor of New York for the surrender of the publisher. But as the publisher had committed no crime and had not fled from the justice of Alabama, the requisition was not honored.

dent Jackson recommended to Congress the passage of such a bill. The bill was prepared. It failed to become a law, partly upon constitutional grounds, and partly because it was believed to be impracticable.

The constitutional argument was in brief: Congress establishes the mails. It cannot prohibit the freedom of the press. Therefore it cannot deny freedom of the mails to any publication unless it is subversive of sound national policy. If it should do so in deference to mere state policy, the state could compel the nation to violate its own Constitution.

Mr. Calhoun, in the Senate, attempted to meet this argument by this proposition: "Let it be fixed, let it be riveted in every southern mind, that the laws of the slaveholding states for the protection of their domestic institutions are paramount to the laws of the general government in regulations of commerce and the mail; that the latter must yield to the former in the event of conflict."¹

This proposition contravenes the letter of the Constitution, but Mr. Calhoun assumed that slavery as a state institution was exempt from invasion, direct or indirect, under the Constitution, and that as the bill tended to enforce this exemption, it therefore was not unconstitutional. The truth was, that there was an irreconcilable repugnancy between the "supreme law" of the Constitution and the supreme exemption of slavery as ordained by state law. The sword would ultimately give the victory to the supreme law of the Constitution.

A northern man known to be opposed to slavery found it unsafe to appear in a southern state. Petitions were constantly presented to Congress in behalf of the slave. The right of petition is recognized by the first amendment to the Constitution: it is not conferred by it, but Congress is thereby prohibited from abridging the existing right.² The right to present a petition to the government implies the duty on the part of the government to receive it. This duty Congress recognized until 1836. In that year the petitions respecting slavery, and especially its abolition in the District of Columbia, over which Congress by the Constitution had full legislative jurisdiction,

¹ Van Holst, i. 139.

² Cruikshank's case, 92 U. S. 542.

became very numerous, and were so offensive to the southern representatives that the House was induced to pass a resolution that all such petitions should be referred to a select committee, with instructions to report that Congress could not interfere with slavery in the states, and ought not to do so in the District of Columbia. This was a practical refusal to consider the petitions. John Quincy Adams was a member of the House, and he opposed the "gag," as it was called, with all his force.

The effect of the gag was to multiply the petitions. But the House adhered to its resolution; making it stronger in succeeding Congresses. In 1840 it adopted a rule, famous as the "twenty-first rule," by which it declared that no petition, memorial, resolution, or other paper, praying the abolition of slavery in the District of Columbia or in the territories, or of the interstate slave trade, should in the future be received by the House, or entertained in any manner whatever. The petitions which flowed into Congress, which Mr. Adams usually presented, for the repeal of this rule, were vast in the number of signatures. For nearly ten years Mr. Adams, with the ever increasing support of the people, struggled for its repeal. He was a foe whom few wished to encounter in debate, and he worthily bore the distinction of the "old man eloquent." In 1844 the twenty-first rule was repealed. The excitement which this needless violation of the Constitution had created brought great strength to the abolition movement. Agitation was its life and support. In 1840 the anti-slavery party cast only 6745 votes for its presidential candidate. In 1844 the same party cast 58,879, enough to secure the defeat of Mr. Clay, and the election of Mr. Polk. The agitation over the denial of the right of petition was one cause of the increased vote; the proposal to annex Texas and thus extend the area of slavery was another.

Both parties, the whig and democratic, supported slavery. The northern members defended the institution upon constitutional grounds; the southern added moral and scriptural grounds. The South was in earnest in defense of its property and institutions; the North was complaisant and calculating, regardful of political expediency and success. The acquisition

of Texas, and of the territory gained through the Mexican War, was promoted by the South and by southern sympathizers in order to give to slavery territory enough to enable it to bring into the Union one slave state south of $36^{\circ} 30'$ as often as a free state came in from territory north of that line.

This concession of new territory to slave extension met with a determined resistance. While the Mexican War was in progress, President Polk asked Congress to place \$2,000,000 at his disposal, to be used in negotiating peace. A bill to that effect was introduced in Congress. Mr. Wilmot moved a proviso, "That it be an express and fundamental condition to the acquisition of any territory from Mexico that neither slavery nor involuntary servitude shall ever exist therein." This motion, convulsed the country, but was ultimately lost. It was famous as the "Wilmot Proviso." The pro-slavery leaders asserted their willingness to extend the Missouri Compromise line of $36^{\circ} 30'$ to the Pacific Ocean. It seemed at the close of the Mexican War that slavery had gained that area for its extension which would suffice to secure to it full political dominion over the nation. But with Texas it gained its last state. It finally lost all because it asked too much.

In 1848 gold was discovered in California. The tide of adventurers poured in. They had no slaves to take with them and no desire to acquire any. In less than a year the newly gathered people outnumbered the population of some of the smaller states. They organized a state government with an anti-slavery constitution, and demanded admission into the Union. True, the greater part of the proposed state lies north of $36^{\circ} 30'$, but its climate, tempered by the Pacific Ocean, is of rare mildness. If any part of the newly acquired territory should be opened to slavery, California was the part best suited for it. If California repelled slavery, there was small hope that the remainder of the new territory would embrace it. Congress debated for ten months over the admission of California. The threatened inequality in numbers of the free and slave states was the central subject of contention, and the Union seemed again in danger of disruption. A compromise, as it was called, was effected. California came in without slavery, on the one

hand, and a new Fugitive Slave Law was passed, on the other. The slave trade was abolished in the District of Columbia; but governments were provided for Utah and New Mexico without expressing any privilege or restriction respecting slavery. On the one hand it was urged that the laws of nature would be effective to exclude slavery; on the other it was claimed that the Constitution by its own vigor permitted its extension there, and would protect it when established. Texas was shorn of her territory north of $36^{\circ} 30'$, and was paid \$10,000,000 for it. Texas wanted money to pay her debts, and the North was expected to consent to the payment, if it obtained more free territory in exchange. In the year 1846, while the Mexican war was pending, our Oregon boundary was settled with England. We had been strenuous in our demand that $54^{\circ} 40'$ was the true line, but the forty-ninth parallel was accepted; the more readily by the administration, it was said, lest another free state should be carved out of the territory. The South conceived that it lost more than it gained by the compromise. Iowa was admitted in 1846, and Wisconsin in 1848. These were the companion states of Florida and Texas in the equipoise between freedom and slavery. By the admission of California the plan for maintaining the equality between free and slave states was destroyed. But the compromise made the nation and all the states protectors of slavery. The North was especially dissatisfied with the new Fugitive Slave Law.

That a fugitive slave law was within the constitutional competency of Congress seems to be clear from the provision of the Constitution that the fugitive "shall be delivered up on the claim of the person to whom such service or labor may be due." The general rule is, that it is competent for Congress to give effect by law to every constitutional provision which is not self-executing, and requires affirmative action. Nevertheless, respectable jurists contended that this particular provision enjoined action upon the several states, and not upon Congress. The North exclaimed with anger and indignation against the harsh and unusual provisions of this particular law. The law provided that the question whether the fugitive negro was a slave should be tried by a commissioner and not by a jury; that the commissioner might receive affidavits in evidence of the identity of the

fugitive, but should not receive the testimony of the fugitive himself ; the privilege of the writ of *habeas corpus* was denied. Any citizen might be compelled to assist in the capture and return of the fugitive. The commissioner was allowed a fee of ten dollars if he found the fugitive to be a slave, and only five dollars if he declared him a freeman. Wherever the execution of this law was attempted at the North, great excitement prevailed ; sometimes violence protected the fugitive from a return to slavery, and sometimes armed force compelled his return. Many of the Northern States retaliated by enacting "liberty laws," enjoining their officers from assisting against the fugitive and requiring their vigilant aid in securing him every lawful protection. While the Constitution of the Union acts within the state and sometimes negatives state action, it cannot compel a state as such to do an affirmative act. The Union may authorize state officers to execute its mandates, but cannot compel them to do so.¹

The so-called compromise measures were proclaimed by both the whig and democratic parties as a "finality," and they greatly applauded them as laying forever at rest the disturbing question of slavery. In the presidential election of 1852, the two parties vied with each other in congratulating the country, meaning the voters, that peace had come by the wise concession of all sections. They concurred in predicting or threatening that any attempt to reopen the questions settled by the compromise would meet with the severest political reprobation. The anti-slavery vote was much reduced. The South believed that the democratic party made these professions with more sincerity than the Whigs, and in this the South discerned correctly. The result was, the democratic party triumphed in the election of President Pierce, and the whig party entered upon the progressive stages of its rapid dissolution.

This party, composed in part of the radical remnants of the federal party, and of the dissatisfied members of the original republican party, and especially of the progressive expansionists of the national power, found a reason for its existence in its opposition to Andrew Jackson, and in promoting the prevalent

¹ Kentucky *v.* Dennison, 24 Howard, 66.

economic views respecting the national bank, protective tariff, and internal improvements. It was a property party, strong in times when industrial and moneyed interests were paramount, but weak, hesitating, and distracted in the presence of a great moral agitation.

It is not improbable that the final solution of the slavery question would have been long postponed, despite the growing strength of the anti-slavery party, had not the South conceived the expedient of abolishing the Missouri Compromise restriction, and thus gaining from northern territory the equivalent for the lost state of California. In 1854 a bill to provide for the territorial government of Nebraska was pending. Nebraska was imperial in the extent of her domain. The word Nebraska signifies the country of broad rivers. The sources of the Missouri were along her western and northern limits, and that great river in its sinuous course flowed within her territory for more than two thousand miles before it reached her eastern boundary, and then for five hundred miles further formed a part of that boundary. The Missouri, the Platte, the Yellowstone, and the Arkansas, with their numerous tributaries, seemed to justify her Indian name. The territory was greater in extent than that of all the free states east of the Mississippi. Aside from its hunting posts, it was uninhabited by white men. There was no special urgency for a territorial organization, and previous bills for the like purpose had failed to become laws. These bills had been in the form usual in such cases, and had expressly recognized the Missouri Compromise restriction with regard to slavery. All of this territory lay north of $36^{\circ} 30'$, and slavery was therefore excluded from it. Mr. Douglas, a senator from Illinois, and chairman of the committee upon territories, in 1854 reported a bill for its government. This bill declared that when the territory should be admitted as a state, such admission should be made regardless of the question whether its constitution permitted or prohibited slavery. Great excitement followed the report of the bill. That its object was to permit the introduction of slavery, notwithstanding the Missouri restriction, was obvious. It was probable that if it should pass, the free population of the North would flow into the northerly por-

tion, and would outnumber the people who would be attracted from the South to the more southerly portion. Mr. Douglas by an amended bill therefore divided the territory into two portions, and gave the name of Kansas to the more southerly. The whole of the eastern boundary of Kansas adjoined the western boundary of Missouri. It was said that there was not a white man living in Kansas at that time. The amended bill was ultimately so framed as to repeal the Missouri Compromise restriction, and declared its own meaning to be "not to legislate slavery into any territory or state, nor to exclude it therefrom ; but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."

It was thought that, under this bill, while the territorial condition existed, slavery could not be excluded, for the reason that the congressional restriction was withdrawn, and although the power was given to the people to form and regulate their domestic institutions in their own way, they must do so "subject only to the Constitution of the United States," which meant, it was predicted, that the Supreme Court would decide that neither Congress nor the territorial legislature had the constitutional power to exclude slavery ; that if slavery could not be excluded from the territory, it would not be excluded by slaveholders when the territory should become a state. In the North this bill created intense excitement. Nevertheless, it became a law. All other political questions became secondary to the absorbing slavery question. Mr. Seward declared that between slavery and freedom there was and must be an "irrepressible conflict." Mr. Lincoln said "the government cannot endure permanently, half slave and half free. It will become all one thing or all the other."

Meanwhile "Uncle Tom's Cabin" appeared. This was a novel, but in it some of the odious features of slavery were woven by genius into a passionate indictment of the institution. It proved to be the fomenter of a revolution. It brought tears to the eyes of children, and conviction and resolution to the hearts of men and women. It made hatred of slavery a sentiment and duty, and hastened the ripening of the struggle

for its final abolition. Except the Bible, no book has been printed in so many languages, or read by so many people in one generation.

In 1855 the republican party was formed out of the northern members of the whig and democratic parties who opposed the Kansas-Nebraska bill. The Republicans did not take the position of the Abolitionists, although they had the benefit of their support. They did not war against the constitutional existence of slavery, but against its territorial extension ; they admitted that it might lawfully exist in the states under the Constitution, but contended that Congress had the power to exclude it from the territories, and that that power should be used ; that the repeal of the Missouri Compromise was a criminal breach of faith ; that slavery could only exist by virtue of positive law ; and that Congress should prohibit its existence everywhere except in the states ; that the Fugitive Slave Law should be repealed.

The new party was the stronger, because not committed to the extreme views and measures of the Abolitionists. The Kansas and Nebraska scheme rested upon the premise that Congress had no constitutional right to exclude slavery from the territories. The argument was that the power was not expressly conferred, and was denied by plain implication ; that the territories were the common property of the whole United States, and were held for the equal benefit of the people of every state, and therefore no law could prohibit the people of any state from taking their property and enjoying it there, whether that property was slave or other kind, since such a law would discriminate against the owners of slave property ; and hence the Missouri Compromise restriction was unconstitutional, and any other would be.

The answer to this position was, that slaves are not property *per se*, but only by force of the law of the state where they are held in servitude, and when the slave is separated from the state whose law makes him a slave, he reverts to his natural condition of freedom ; and that to make a slave in a new territory, the law of that territory must so declare, and hence no slave can continue to be a slave in any territory of the United States,

unless the law of or for a territory so declares. What the law shall be, it is for Congress, as the regulator of the territory, to declare, and Congress may declare either way, and hence can admit or exclude slavery from the territories. Under the Missouri Compromise Congress was honorably bound not to admit slaves north of $36^{\circ} 30'$.

The Constitution vests in Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" but it was said by the friends of the bill that this provision related only to territory belonging to the United States at the time of the adoption of the Constitution, and did not contemplate the government of territory, but the sale or other regulation of it; that the provision speaks of "territory or other property" of the United States to be disposed of, and in no way confers upon Congress the power to govern the territory. This view of this provision of the Constitution was sanctioned by the majority of the United States Supreme Court in the celebrated Dred Scott case.

The South did not underestimate the danger to slavery arising from the fact that the constitutional position taken by the republican party opened so easy a door to the union of all anti-slavery elements, without committing the party to the extreme position of the Abolitionists. The Republicans continued to repeat that they did not oppose slavery in the states where the Constitution permitted its existence; that they opposed only its extension into the territories where the Constitution, if rightly construed, permitted its restriction. But the argument against the extension of slavery was but a verbal limitation of the argument against slavery itself, and as it was urged with increased intensity on the part of the North, the exasperation of the South increased.

In 1856 Mr. Sumner, a distinguished and eloquent senator from Massachusetts, made a speech in the Senate against slavery, and the attempt to extend it, and he chose to denounce the latter as "the crime against Kansas." This speech gave personal offense to a senator and representative from South Carolina. The representative, a Mr. Brooks, whilst Mr. Sum-

ner was seated in his place in the senate chamber, struck him violently upon the head with a cane. Mr. Sumner suffered for years from the effects of this outrage. But the blow had wider effects; it helped to consolidate the rising North against the existence, as well as the extension, of slavery. Thus the effect of the republican position was practically the same as if the party had adopted the ultra views of the Abolitionists. The Republicans advanced with the contest, and assailed slavery wherever it was practicable to strike it. It was obvious that the contest was rapidly assuming all the aspects and fierceness of a religious war, and could only end in bloodshed or by the subversion or amendment of the Constitution.

The Kansas-Nebraska bill having become a law, the Republicans and Abolitionists, defeated in Congress, determined to wage the contest in the territory itself, and if possible snatch the victory from the pro-slavery party. The law permitted the people of the territory to regulate their domestic institutions in their own way. New England rose to the contest, and organized emigrant aid societies. Money was freely contributed, and resolute men from Maine to the Mississippi River, carrying rifles on their shoulders or among their household goods, began to flock into Kansas. The pro-slavery champions also became vigilant and active. They had the vantage-ground of the adjoining slave state of Missouri, and when needed could make accessions to the forces gathered from distant states by temporary migrations over the border. Kansas became the field of strife and bloodshed between the parties, who devoted themselves to proposing constitutions and fighting each other. It is not needful to enter into details. After six years of contest in Kansas, in Congress, and in the nation, victory passed to the side of the anti-slavery party, but not until after the election of Mr. Lincoln. Upon the withdrawal of sufficient senators and members of the House to give the Republicans the control, Kansas was admitted in January, 1861, with a free state constitution.

The struggle in Kansas made it apparent to the South that in practice, popular sovereignty would give the victory to northern zeal, wealth, and activity. In the campaign of 1856 the

southern Democrats obliged the party to declare that the principle of state equality was a supplementary part of the doctrine of popular sovereignty. The significance of this supplemental doctrine was not generally perceived until the Dred Scott decision was pronounced in March, 1857. Then it was seen that the extension of slavery into the territories was permitted by the Constitution and could not be prohibited by Congress.

The great importance of this case will justify a particular statement of the questions which the court undertook to decide.

Dred Scott was held as a slave in the state of Missouri by the defendant, a citizen of the state of New York. He brought his action in the circuit court of the United States for the district of Missouri to recover his freedom. The Constitution (art. 4, sec. 2) provides that "the judicial power of the United States shall extend to controversies between citizens of different states." To invoke this judicial power, that is, to give the court jurisdiction, Scott stated in his bill of complaint that he was a citizen of the state of Missouri, and that the defendant was a citizen of the state of New York. The defendant, by a plea in abatement, challenged Scott's right to bring the action by alleging that he was not in fact a citizen of Missouri, because he was a negro of African descent whose ancestors were of pure African blood, having been brought into this country and sold as slaves. To the defendant's plea, Scott demurred, which meant, "Conceding I am such a negro, it does not follow that I am a slave, or am not a citizen." The circuit court held with Scott on this point, and thus held that it had jurisdiction, but permitted the defendant to plead, and prove, if he could, that the court had no jurisdiction, by showing that Scott was a negro slave and his lawful property as such slave. The facts were conceded to be, that Scott had been a negro slave belonging to Dr. Emerson, an officer in service in the United States army, who in 1834 took him from Missouri to a military station at Rock Island in the state of Illinois, and held him there as his slave until 1836, when he took him to Fort Snelling, in the territory west of the Mississippi River, north of 36° 30', then known as upper Louisiana, which had been acquired from France, and there held him as his slave until 1838, when he

took him back to the state of Missouri and there sold him to the defendant. It did not appear that Emerson intended to remain at either military station longer than his official services were required. It was contended in behalf of Scott that inasmuch as slavery was prohibited in the state of Illinois not only by the laws of that state, but by the Ordinance of 1787, and also in the Louisiana territory, north of $36^{\circ} 30'$, by the Missouri Compromise Act of 1820, in either place the law made him free, and having been born in the United States, he became by birth and his freedom a citizen of the United States, and thus of the state of Missouri, in which he resided when he brought his suit. The circuit court decided that Scott was not a citizen, and therefore could not maintain his suit. He appealed to the Supreme Court.

This court, speaking by the chief justice, held that as Scott conceded that he was a negro of African descent whose ancestors were of pure African blood, and had been brought into this country and sold as slaves, he therefore was not and could not become a citizen within the meaning of the Constitution of the United States, and hence it followed that the circuit court had no jurisdiction of the case, and should have dismissed it. The argument to support this decision mainly rested upon the proposition that such a negro was not and could not become a member of the political community formed by the Constitution, because by its fourth article, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and the extension of such privileges to such a negro was not intended by the framers of the instrument. That "people of the United States" and "citizens" are synonymous terms in the Constitution, and the sense in which these terms were understood when the Constitution was framed did not include negroes, since they were regarded both in this country and England as "an inferior class of beings," "an ordinary article of merchandise and traffic," "never thought of or spoken of except as property," "separated from the white race by indelible marks," "far below them in the scale of created beings," and as having "no rights which the white man was bound to respect." The people of the United States, not these degraded creatures, framed the Constitution, and whatever rights any

state might give to any of them, it could not obtrude them into the general citizenship, so as to secure to them "all privileges and immunities of citizens in the several states," and hence not the right to sue the citizen of another state. And in various ways and at great length, it was sought to show how absurd it was to contend that such a negro, or in fact any negro, was a citizen within the meaning of the Constitution.

The judgment of the court, as announced by the chief justice, directed the suit to be dismissed for want of jurisdiction. The court in its opinion proceeded to consider the proposition whether, if the court had jurisdiction, the judgment against Scott was right on the facts. It was pointed out in the dissenting opinion of Mr. Justice Curtis that if the court had no jurisdiction of the case, and that fact appeared upon Scott's demurrer to the defendant's plea in abatement, then the judicial power of the United States did not extend to the case itself, and the court was therefore without power to consider the merits, and should dismiss the case without passing upon the grounds upon which Scott claimed to have acquired his freedom and citizenship. But some of the judges held that it made no difference whether want of jurisdiction was shown upon the plea in abatement or upon the conceded facts, since either case was fatal to Scott, and as seven of the nine judges were against him upon one or more grounds, the opinion should cover every ground.

The opinion of the chief justice proceeds to declare that Scott's claim to freedom because his master took him into the territory of the United States west of the Mississippi River, north of $36^{\circ} 30'$, and kept him there for two years, was not valid, because Congress had no power to pass the act prohibiting slavery in such territory. That the territory was acquired from France by the United States as trustee for the benefit of the people of the whole United States, and with the purpose as declared in the treaty of forming states; and as slaves were property over which the Constitution conferred no power, except that coupled with the duty of protecting the owner in his rights over them, it followed that any owner could under the Constitution lawfully take them into such territory in like manner as other property, and as the act of Congress prohibiting

it interfered with this constitutional right, and deprived him of such property without due process of law, if he took it there, it was void. That the provision of the fourth article providing that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States" had reference only to the territory belonging to the United States at the time of the adoption of the Constitution, and therefore did not extend to this after-acquired territory; the power of Congress over it being incidental to its title, and resulting from its duty to discharge its trusteeship for the benefit of the whole people; but as the power of Congress was none other than the constitutional power, and as the constitutional power to prohibit slavery anywhere was never given it, it had none to exercise over this territory, and therefore the act attempting to do so was void.

It was contended in behalf of Scott that the Constitution had by its sixth article ratified the "engagements entered into before the adoption of the Constitution," namely, the Ordinance of 1787, whereby slavery had been forever prohibited in the territory northwest of the Ohio, and that the first Congress in 1789 did confirm and reënact the ordinance, and thus Congress had under the Constitution the power to prohibit slavery in the territories, and had done so. To this the court answered that Virginia as a sovereign state ceded this territory to the confederacy of the United States under an engagement or treaty that slavery should be forever prohibited in it, and that the Constitution recognized this engagement and the act of Congress carried it into effect, so long as the territorial government continued and no longer; but that apart from the constitutional assumption of the agreement between the confederacy and Virginia as to this particular territory while under territorial government, Congress had no power to prohibit slavery, and therefore none to prohibit it in Illinois. That as Scott was a slave when taken into the state of Illinois by his owner, and was there held as such and brought back in that character, his status as free or slave depended on the laws of Missouri and not of Illinois, and that by the laws of Missouri he was a slave.

The South was triumphant. The anti-slavery men of the North felt outraged and injured. If slavery was indeed guaranteed by the Constitution in all the territories, if the free negro, as well as the slave, under the federal Constitution "had no rights which the white man was bound to respect," the battle was hopelessly lost. It was plain that there was no standing-room left for the contest except by a popular revolt against such a Constitution.¹

It so happened that two of the justices of the Supreme Court, Mr. Justice McLean and Mr. Justice Curtis, dissented. The latter delivered an opinion in which he combated the propositions of the majority. He marshaled in cogent and luminous order the history and legislation of the states and nation, and proceeded to show that the free negro was a citizen of five of the states at the time of the adoption of the Constitution; that citizenship of the United States only existed through citizenship of a state, and therefore the free negro could be a citizen both of the United States and of a state; that the condition of slavery was contrary to natural right, and could only exist by positive law, and then only in the place where the positive law had force, and not outside of that place; that when a slave passed from the state whose laws made him a slave to a state whose laws made him free, he became, unless he was a fugitive, free; and the condition of freedom once attaching, he became, if born in the United States, a citizen, and could not be deprived of his right as a citizen, or of his liberty, without due process of law; that the constitutional provision, giving Congress power to "make all needful rules and regulations respecting the territory belonging to the United States," was framed with refer-

¹ The chief justice, in using the phrase that the negroes "had no rights which the white man was bound to respect," in form used it as expressing the manner in which they had been regarded in the colonies for more than a century before the Constitution was framed. But then he proceeded for several pages in his opinion to present an array of facts and argumentation to show not only that this status of the negroes existed, but that he believed it must continue. This pitiable condition of the race thus pitilessly presented by the chief justice, and confirmed in apparent perpetuity by the solemn judgment of the national court, exasperated many and saddened more. If the chief justice, so exalted in position, and, apart from his views of slavery and the negro race, so humane and benevolent, together with the majority of the court, honestly entertained this conviction, little hope from the humanity of the slaveholding class remained.

ence to territory to be acquired as well as to that already possessed, since at the time of the adoption of the Constitution Georgia and North Carolina had not yet ceded to the United States their "back country," but were expected to do so, and soon after did ; that Congress had power to exclude slavery from all territory, if it should judge such exclusion to be a "needful regulation ;" and hence the Missouri Compromise exclusion was constitutional. It must be said, however, of this dissenting opinion that it was the keen and caustic argument of the technical lawyer, who was forced by the Constitution to treat slavery as an institution firmly intrenched and shielded by it. The dissenting judges could not smite it as a crime, as a national sin ; they were compelled to seek or invent flaws and joints in its constitutional coat of mail, through which to pull out a former slave into his freedom.

This opinion is now supposed to be a correct exposition of the constitutional questions involved. The Republicans, willing to be convinced, accepted it as the truth, and denounced the decision of the majority of the court as a perversion of the Constitution. They denounced the court itself with unsparing bitterness. Posterity acquits the court of intentional error. The judges could not escape from the influence of education, political beliefs, and predilections ; they believed that the law was as they declared it. The Dred Scott decision occupies over two hundred pages of the book of reports. It will remain as a striking example of the influence of erroneous education and prepossessions upon the minds of the best and ablest men, and as the monument of the most colossal and most persistent of all the legalized forms of "man's inhumanity to man."

It was not easy for the Republicans to say that the decision should be defied, but it was easy to say that in due time it should be reversed, or the Constitution amended. This decision, added to the bitterness of the struggle over Kansas, weakened the adhesion of the northern wing of the democratic party to the ultra pro-slavery policy of the South. The Democracy of the North could not be held together upon a slavery-extension platform. The popular sovereignty doctrine suited them better : for they conceived that under it slavery in the territories could,

as the phrase was, "be voted up or down," and whether one way or the other, the party would not be responsible for the result. The Constitution would fix that. "I am for the Constitution" was the current phrase of the northern partisan who, never realizing the moral question involved, or annoyed by its growing force as a political factor, still sought party success through truculence to the slave power. His position was not strange, for the only practical way in which slavery could be abolished was by an amendment to the Constitution, or by war.

Many Christian people, however, both before and after the decision, felt constrained to support slavery so long as it was sanctioned by law, since obedience to the government in all things not repugnant to the divine law is the ordinance of God. Other good people declined all responsibility for the evil, because they saw no way to remove it.

The democratic convention in 1860 divided upon the question whether the Constitution itself extended slavery into the territories, or simply permitted it to be extended. Two conventions were held. Mr. Breckinridge was nominated by the southern, Mr. Douglas by the northern. Mr. Lincoln, the republican candidate, had an easy victory over the divided opposition.

The crisis of the long struggle culminated upon the election of Mr. Lincoln. Slavery was left with only the southern wing of the Democracy for its champions and defenders. South Carolina was the first state to pass her ordinance of secession. Florida, Mississippi, Louisiana, Texas, Georgia, and Alabama followed. Actual secession at first brought consternation to many at the North. Mr. Buchanan yet remained President, and many measures were suggested to avert the dissolution of the Union. Congress recommended an amendment to the Constitution which forbade Congress ever to interfere with slavery in the states. For a time it seemed possible that slavery might be lifted to greater stability and power. A "Peace Congress," composed of amiable gentlemen from the several Northern States and from some of the Southern States, assembled at Washington early in 1861 in the hope of composing the "unpleasantness." Its advice passed unheeded. President Buch-

anan deplored secession as a calamity, but intimated his doubts whether Congress had any coercive power to avert it.

President Lincoln, in his inaugural address, said, "I have no purpose directly or indirectly to interfere with slavery where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."

But the seceding states did not wish to return. They hastened to assemble, and they formed their own federal government, which they styled "The Confederate States of America." They recognized slavery, and practically adopted the same sort of government which they had contended the United States rightfully was, and would have been, had its Constitution been strictly construed, and implied and constructive powers rejected.

As the secession movement gained in strength and virulence the North began to consolidate for the maintenance of the Union. South Carolina on the 11th day of April, 1861, opened fire upon Fort Sumter, and after thirty-four hours of defense Major Anderson was compelled to surrender it. Then the North determined to wage war for the Union. Thereupon Virginia, North Carolina, Tennessee, and Arkansas joined the southern confederacy, making eleven states in all. Delaware, Maryland, Kentucky, and Missouri, with feeble majorities and faltering fidelity, remained in the Union.

The United States, or what remained of it, resolved to subdue the rebellion. The right to do this has been much debated. That every national government has the right to employ all its might to prevent its own destruction would seem to be demonstrated by the universal assertion of that right. The instinct and the law of self-preservation compels it. It is a useless disputation which denies the right. Even Mr. Buchanan receded from his position of the want of constitutional power to coerce obedience and submission. The sword became the final argument; the United States resorted to arms to preserve its existence and integrity. It declared that its purpose was to preserve and restore the Union. It disclaimed any intention to interfere with slavery in the states where it constitutionally existed.

The power of the people was then shown. The government

would have been helpless if the people had not risen to support it. To subdue the rebellion was altogether too stupendous an undertaking for the ordinary machinery of the government. The people stood behind the government and went before it. With a loyalty and patriotism which only great crises can evoke, they welcomed as a duty the sacrifice and cost of the struggle. The people were greater than the Constitution, the laws, and the government combined ; they rose to preserve and defend them, to the end that when the Union and peace should be restored, the Constitution, the laws, and the government might survive.

But the rebellion was not to be subdued easily. The status of the slaves became important. General Fremont early proposed to free them in Missouri, but the President overruled him. The slave regarded the Union soldier as his friend. The war began with a disclaimer of intent to free the slave, but as it went on, public sentiment began to demand a reversal of this declaration, and less tenderness in preserving his master's title. General Butler greatly gratified this sentiment by declaring the slave "contraband of war." This was grim humor, and the people enjoyed and applauded it.

In September, 1862, the President gave notice that he would emancipate the slaves if the seceding states should not return to their allegiance by the first of January, 1863. He had little reason to expect their return, and he gave this notice in order to make the way easier for the proclamation of emancipation, and to prepare the public for it. The first of January, 1863, arrived, and the proclamation was issued. The North recognized its necessity and applauded its justice. Hundreds of thousands rejoiced because the true object of the war was at last declared. The hopes of the most radical were realized. The war wrought a great revolution in northern sentiment. The name "Abolitionist" ceased to be a reproach. After the Emancipation Proclamation, vast multitudes of Republicans and Democrats became Abolitionists in sentiment, and would have regarded the war a failure if peace had reinstated slavery. A restored Union with slavery rehabilitated and strengthened by the blood of the uncounted slain was awful to contemplate.

Slavery was the cause of the war; if permitted to survive, it would cause it again. Nothing less than the complete extinction of slavery and the consecration of the nation to universal liberty could be an equivalent for the enormous expenditure of blood. There were many who regarded the proclamation as a violation of the Constitution, but an appeal to the Constitution in behalf of rebels in arms against it was regarded as sympathy with them, and found scant favor. The war must be victoriously ended, or the Constitution itself would be of no value.

As commander-in-chief of the army and navy the President has the constitutional power to employ the means recognized by the laws of war as necessary to conquer the enemy. Congress cannot deprive the President of the powers which the Constitution confers in creating him commander-in-chief, but it may refuse to raise the necessary armies. The Emancipation Proclamation was valid wherever the Union arms prevailed.

Congress repealed the Fugitive Slave Law in 1864. When the war was nearly ended, doubts arose as to the scope of the Emancipation Proclamation. It was urged that as a war measure its effect was limited to the combatants who were aiding the rebellion, since war justifies war measures against them only. This construction would limit the scope of the emancipation, and leave great numbers in slavery. To remove the grounds of debate and to make the emancipation complete, the Thirteenth Amendment was proposed by Congress and ratified by the requisite number of states. Slavery was constitutionally ended. The Dred Scott decision was superseded. The nation was led through war and blood that slavery might be abolished. Daniel Webster said: "There is not a monarch on earth whose throne is not liable to be shaken by the progress of opinion, and the sentiment of the just and intelligent part of the people." The progress of opinion shook the republic almost to its fall, and re-established it upon the foundation of the Declaration of Independence.

A word with respect to President Lincoln. Every one now knows that he had a rare combination of goodness and greatness, of common sense and of uncommon sagacity. Our people scarcely knew him when he became President, and they had a

painful distrust of his fitness for his high place in the alarming emergency which ensued. But he soon began to disclose the great qualities which his modest career had hitherto concealed. Patient, cheerful, thoughtful, and deliberative, we knew him to be; but the war proved how energetic, capable, hopeful, courageous, firm, and just he was. He safely led our people through the great crisis and danger. He had courage amid peril, confidence among the doubting, firmness against opposition. His energy evoked and directed the mightiest resources; his moderation restrained the impetuous; his wisdom governed in the council and inspired in the field. His hope was a strength. His manner was mild and cheerful, and unchangeable by censure or injustice. He tempered the severities of war by his benevolence and fairness, and at last compelled the conquered enemies to expect more from his sense of justice than from any other resource. He was assassinated April 5, 1865. Time has silenced detraction, and confirmed his fame. We have no other national character the details of whose whole life we know so well. The more we learn about him, the higher we exalt the pinnacle of his greatness.

CHAPTER XII.

THE RECONSTRUCTION PERIOD.—THE NEGRO AS A CITIZEN AND VOTER.—INTERNATIONAL ARBITRATION.—INTERSTATE COMMERCE.—ERA OF GREAT ENTERPRISES.—TARIFF.—TAXATION.—CUBA.—PORTO RICO.—HAWAII.—THE PHILIPPINES.—RIGHT OF INTERVENTION.

GENERAL LEE surrendered to General Grant in April, 1865. The immediate question then was : What are the relations between the United States and the seceded states ? To restore them as states of the Union was the object to be attained ; but how to adjust the terms and conditions of their return, and what these should be, was a problem of the greatest difficulty. President Lincoln notified the generals of our armies that he reserved these questions to himself. In his last public address, made only four days before his death, he said : "It may be my duty to make some announcement to the people of the South. I am considering, and shall not fail to act when satisfied that action will be proper." But he was assassinated within a week after Lee's surrender, and Andrew Johnson became President.

President Johnson was another remarkable product of American Democracy. Learning to read after he had nearly attained his majority, he supplied in some sort by his maturer diligence the lack of early advantages. By dint of native force he rose from poverty and obscurity to the foremost positions in his state and in the nation. He fought his way upwards, and his disposition and temper led him to hate the men and systems which opposed his rise. He hated slavery because the system accorded no place nor respect for the toiling white man. He hated treason because he knew so many whom he regarded as traitors who had been his personal enemies. He loved liberty and his country because but for them he had never risen from his low estate. He was honest, aggressive, and passionate, and took counsel largely of his feelings. Had he been a Frenchman of the era

of the Revolution, he probably would have been a Jacobin, foremost to strike for liberty, and foremost to be struck by its vengeance. Booth's pistol lifted him suddenly to the supreme place in the nation. The crisis in his country's destiny was momentous; his own power and influence commanding. The fate of the South seemed committed to his hands.

The reconstruction problem was not in the minds of the framers of the Constitution. Power was given by the provision that "The United States shall guarantee to every state a republican form of government;" but how and by whom that power should be wielded was not defined. This guarantee, however, assumes that the state is in the Union and desires such a government. If in the Union, it was urged that the rebellious State had the right to frame a republican government to suit itself,—an absurdity under the circumstances. The better argument was that the war had confirmed beyond all dispute the power and right of the Union to capture and hold fast an escaping fugitive state; and that to disable and subdue it were the proper means. The right of the Union to relieve the state from this disability, wholly or in part, was the sequence of the power, and this involved control of the terms of the relief. The Constitution gave to Congress the power "to make all laws which shall be necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States," but the laws remained to be passed, and Congress was not now in session. The Constitution was obviously made for states in the Union of their own free will, and not for seceding states compelled to return,—theoretically in but practically out. The problem was, as Mr. Lincoln had expressed it, how to restore these states to their practical relations to the Union. Who should take charge of the business, the President or Congress? The war was over, but care was necessary lest the objects of the war should be lost. These objects had changed as the contest advanced.

In 1861 Congress by a joint resolution had declared the objects to be, "to defend and maintain the supremacy of the Constitution, and all the laws passed in pursuance thereof, and to preserve the Union with all the dignity, equality, and rights

of the several states unimpaired ; that as soon as these objects are accomplished the war ought to cease." But in 1865 slavery had been overthrown, and the national demand, after peace had been won by coercion, was very different from its demand when peace was first disturbed.

It was now April, and Congress would not meet until December. President Johnson resolved to attempt the solution of the difficulties which confronted him without aid from Congress. In this he seemed to be justified by the action and declarations of President Lincoln. Mr. Lincoln had plainly indicated in dealing with the state of Louisiana, before his reëlection, a purpose to take charge of the reconstruction of the seceding states. With the triumph of our arms we had obtained possession of the Mississippi River, and military control of the state of Louisiana. Mr. Lincoln was anxious to establish civil government in that state upon the suffrages of those who should resume their loyalty to the Union. Under the direction of the military governor two members of Congress were chosen, and in 1863 they were admitted to their seats. Mr. Lincoln conceived that under the constitutional obligation to guarantee to every state a republican form of government, it would be practicable to form such a government in Louisiana and uphold it by military power. His idea was to start with not less than one tenth of the electors. These should, upon taking the proper oath of loyalty and obedience, be restored to their civil rights and property, except as to slaves, and be permitted to establish the civil government. In 1864 steps were taken in that state to carry out the President's plan. State officers were chosen and an anti-slavery constitution adopted. A little more than one tenth of the electors participated in the elections. The state of Arkansas the same year took similar action. Neither of these governments could sustain itself without the military support of the nation. Nevertheless, Mr. Lincoln's idea was, as he expressed it, that "they constituted the eggs from which a government could be hatched, and grow to be full fledged." Congress dissented sharply. It refused to admit the representatives sent by Arkansas, alleging that the rebellion was not yet suppressed there, but only held in check. It passed a bill for the estab-

lishment of governments in the rebellious states. This bill authorized the President to appoint a provisional governor for every one of these states. When armed resistance to the United States should cease in any state, the governor should enroll the electors, and appoint an election for delegates to a constitutional convention ; this convention should frame a constitution conforming to the Constitution of the United States, abolishing slavery, disfranchising certain confederate officers, and repudiating the rebel debt. If adopted by the voters, it should be certified to the President, and if approved by Congress, the state government should be considered as properly reconstructed. Congress thus plainly asserted its objections to the President's plan of reconstruction, and its determination to control the matter itself. Mr. Lincoln was a candidate for reëlection, but he refused to approve the bill. He said he was unwilling to commit the government to an inflexible plan ; that the plan proposed by Congress was proper for states choosing to adopt it, and he would try and carry out the plan by means of military governors. An attempt was now made to defeat Mr. Lincoln's reëlection by charging him with an assumption of unwarrantable executive power, and an encroachment upon the functions of Congress. But his reëlection demonstrated that he had the confidence of the people.¹ Beyond doubt he intended to manage the reconstruction of the state governments without any direction from Congress. He meant to move carefully, securing the assistance of all loyal white men, striving constantly to increase their number, bringing to their aid the best portion of the blacks, guarding all by military power if it should be necessary, and moving, as he expressed it, from point to point as far ahead as he could clearly see, and changing his course when he discovered that it was necessary, or that he had made a mistake. What his plans would have developed into, he did not know, but he was confident that they could be moulded to meet the emergencies of the situation and finally restore all the states to the Union.

President Johnson, unfortunately for himself, did not inherit the commanding influence of Mr. Lincoln, or the qualities which

¹ Mr. Lincoln received 212 electoral votes, and General McClellan 21.

inspired it. His first public utterances after his accession to the presidency were in fierce denunciation of the rebellion as treason, and of its principal leaders as traitors, richly deserving the punishment appointed for that crime.

The southern leaders who had buffeted and denounced him as a pestilent renegade were appalled by the violence of his denunciations, and by the vengeance he seemed ready to wreak upon them. They soon became suppliants for his favor, and used their best efforts to conciliate him. He surprised both his friends and enemies by a sudden change in his tone and temper. He became forbearing, forgiving, magnanimous. His revised intention was to allow the seceding states to resume their self-government, and their places in Congress, without exacting from them any guarantees beyond their forbidding slavery and repudiating the debts incurred in aid of the rebellion.

On the 29th day of May, 1865, he issued an amnesty proclamation, pardoning the greater part of those who had participated in the rebellion, and restoring their property except as to slaves, upon the simple condition that they should subscribe and take an oath to support and defend the Constitution and the Union of the states under the Constitution, and obey all laws and proclamations in regard to the emancipation of slaves. Various classes of the most influential and obnoxious participants in the rebellion were excluded from this pardon; but these were advised that their individual applications would be favorably considered. He declared that the rebellion in its revolutionary progress had deprived the people of all civil government. He appointed a provisional governor of the state of North Carolina, and soon after of seven other states. He enjoined these governors to make provision for the election of loyal delegates, and for their meeting and framing a new state constitution. Thereupon the legislature should meet and in accordance with such new constitution frame the proper laws. Those persons who had the qualifications of voters under the laws existing at the date of the state ordinance of secession, and who should take the oath above prescribed, were to be entitled to vote for delegates to the constitutional convention; this convention and the legislature should prescribe the qualifications of

electors and the eligibility of persons to hold office. This proclamation recited that this "power, the people of the several states composing the federal Union have rightfully exercised from the origin of the government to the present time."

These provisional governors were thus practically made the supervisors of the reconstruction of the state governments, and under this system the way seemed short and easy for the states to resume their former places in the Union. But it was seen that the negro had no privilege of voting in the first instance, and it was not to be expected that the right would be accorded him under the new state constitutions; no guarantee that justice should be done him was exacted. These new constitutions were formed, the legislatures met, laws were made, senators and representatives to Congress were chosen; but the negro was not only not admitted to any participation in the government, but the new legislatures shocked the northern sense of justice by the cruel and revengeful laws which they enacted. The barbarity of the most odious slave code was under various disguises applied to the negro in his new condition of freedom.

Poverty was declared evidence of vagrancy. Negroes who were orphans or unprotected were condemned to an apprenticeship until they became of age,—twenty-one years for males, eighteen for females. Their masters were given authority to punish them for offenses, of which the master was appointed the judge; if the apprentice fled from this bondage, the master could pursue and capture the fugitive. The law against vagrancy was so framed as to embrace the great mass of the colored population. Inexperienced in their new freedom, a condition of vagrancy might well be expected to precede the more stable settlement and pursuits which the demand for their labor would afford, and necessity ultimately enjoin. The vagrant blacks were made liable to arrest and fine, and if unable to pay the fine they were to be hired out to the bidder who would pay the fine for the shortest term of service. If a negro should make a contract to perform service and should violate it and leave the service, his employer was authorized to arrest him and compel his performance of the service, and the expenses of his arrest might be charged against his wages.

It is proper to say that the same laws were not enacted in all the seceded states, but their purpose and effect were the same in a majority of them. The fact that such laws were enacted anywhere exasperated the North to an extreme degree.

The reconstruction scheme of President Johnson was doomed to failure from the start. He was unfortunate in his assumption of great and questionable powers without any legislation to give the powers proper regulation and effect. He was unfortunate in his sudden change of sentiment towards the seceded states and their leaders. He was unfortunate in the abuse made of his clemency. He conceived that it would be happy for his fame and possibly secure his election as his own successor if he should bind up the wounds of his bleeding country, and welcome back into the Union the once erring but now submissive states. He mistook the temper of both the North and South. He had little facility to perceive his mistakes, and less to correct them. His obstinacy and passion increased the more he was opposed. He clung to the impracticable until he was crushed ; and his defeat and humiliation were signal and irremediable.

Congress met in December, 1865, alarmed and indignant. It was plain that the seceded states, encouraged by President Johnson's construction of the Constitution and of his powers under it, and by the scheme of reconstruction which he had set on foot, felt they had full room to give force to their resentment, and to avenge upon the negro the humiliation and defeat they had sustained in their appeal to arms. That they should regard the negro as unfit for freedom, and the indirect cause of their calamities, was entirely natural. Nothing could be more hostile to the spirit of their training and their habits of thought than to humiliate themselves by advancing and rewarding him. It is too much to expect the vanquished to welcome the conditions imposed by the victor.

The people of the seceded states believed their cause to be just. They placed their all at hazard in its support and defense ; and they lost. Their slaves might become their masters, or their own avengers, unless every obstacle should be interposed. Revenge, a sense of danger, and bitterness of spirit inspired them, and made them unjust. But Congress rightly determined

that while the nation was sitting in judgment upon the subdued insurgents and exacting security for the future, if not indemnity for the past, the offenders, who were brought before the bar of the nation, should not take seats upon the bench of judges. The difference between states united by amity and states held together by force justifies difference in treatment.

Congress was at first distracted by the variety of plans for reconstruction which were proposed, but it ultimately took charge of the business with a strong hand. It resolved to repudiate the President's plan and frame one of its own. To do this it was necessary to pass laws over the veto of the President. The event showed that it had the two thirds necessary for this purpose. Congress adopted a plan of reconstruction, upon the theory that the war continued until the states should, by abolishing slavery, adopting universal suffrage, and conforming their governments to the new order of things, give reasonable assurance that there should be no governmental discrimination against the black man, no danger of his losing his equality of right; and that the new Union should be guaranteed by the votes of the emancipated slaves.

With the emancipation, the slaves became free, and, under the Constitution, in apportioning the members of Congress, the freed persons would be counted in full, and not as slaves at three fifths as before. Thus these states would have an increase of political power as the result of their apostasy and disloyalty. This the North would not concede except upon conditions securing justice to the colored race, and protection against other abuses. The North feared that the very liberal amnesty granted by the President to persons engaged in the rebellion would open the way for the rebellious officers both civil and military to resume office in the nation and their states. The assumption of the debts of the rebellious confederacy might be accomplished by the union for party purposes of northern and southern votes in Congress. Payment for slaves, compensation for losses in the war, repudiation of the national debt, pensions and bounties to rebel soldiers, or refusal of them to loyal soldiers, should be made impossible. The Constitution should be amended before the seceding states should be restored

to political power in the Union. These safeguards could be secured only by an amendment to the Constitution, and if the rebellious states should be restored to the Union before such an amendment should be made, it could not be made afterwards, since, needing three fourths of the states for its ratification, the rebellious states would not concur.

The details would be long to narrate, but the results may be briefly stated. Congress declared that it was the depositary of the power to devise the proper plan of reconstruction ; it refused to recognize the governments established in the seceded states under their new constitutions ; it would not admit their senators and representatives ; it repudiated and denounced their laws respecting the negroes. It first passed a Civil Rights bill, by which it conferred citizenship and equality of rights upon the negro. It then proposed the Fourteenth Amendment, and offered to receive any state into the Union upon its ratification of this amendment. Tennessee alone ratified and was restored.¹ The other ten states refused to ratify. Relying upon the plan and advice of the President, some of these states rejected the amendment unanimously ; others rejected it with substantial unanimity. Congress then superseded the state governments and established military governments over the states.² It provided that the people of these states might relieve themselves from the military governments upon the ratification of the Fourteenth Amendment, and upon their adopting such constitutions and governments as Congress should approve ; the essential requisites of which should be equality of rights and of

¹ In his message approving the joint resolution "restoring Tennessee to the Union," President Johnson caustically called attention to the anomalous position taken by Congress that Tennessee was a state for the purposes of ratifying the amendment, but not for representation in Congress.

² The following extracts from Mr. (afterwards President) Garfield's remarks in the House of Representatives, while the bill to establish military governments was under consideration, will give some idea of the spirit of Congress : "I call attention to the fact that from the collapse of the Rebellion to the present hour, Congress has undertaken to restore the states lately in rebellion by coöperation with their people, and that our efforts in that direction have proved a complete and disastrous failure." Alluding to the fact that the Fourteenth Amendment had been submitted as the basis of reconstruction, Mr. Garfield continued, "If the rebel states had adopted it as Tennessee did, I should have felt bound to let them in on the same terms prescribed for Tennessee. I have been in favor of waiting to

suffrage to the black man. The elections at the North gave to Congress such a preponderance of power over the President that the seceded states finally acceded to the plan proposed by Congress, and were ultimately restored to their self-government and places in the Union.

The struggle between the President and Congress was long and bitter, and finally culminated in an ill-advised and unjust attempt to remove him by impeachment; an attempt which failed by only a single vote. As the difference between the President and Congress increased in bitterness, Congress, over the President's veto, amended the statute passed by the first Congress of the Union, regulating the tenure of certain civil officers. Among other regulations the amendment purported to deprive the President of the power to remove any member of his cabinet without the advice and consent of the Senate. The President might, however, suspend such officer for cause, during a recess of the Senate, and designate another person to hold it, but if the Senate should signify its disapproval, the suspended officer should be restored. The veto was based upon the ground that the amendment was unconstitutional.¹ The President, in August, 1867, during the recess in the Senate, suspended Edwin M. Stanton from the office of Secretary of War, and designated General Grant to act in his place. General Grant took possession. The Senate, in January, 1868, notified the President that it did not concur in the suspension. Mr. Stanton resumed possession of the office. In February, 1868, the President removed Mr. Stanton and designated General Lorenzo Thomas to act as Secretary of War. Thereupon the House of Representatives preferred articles of impeachment against the President. The real question was whether the President had acted within his constitutional right, or if he had not, whether he had probable cause to believe he had so acted. Congress wanted to remove him, and this was the best legal pretext

give them full time to deliberate and to act. They have deliberated; they have acted. The last one of the sinful ten has with contempt and scorn flung back in our teeth the magnanimous offer of a generous nation. It is now our turn to act. They would not coöperate with us in building what they had destroyed. We must remove the rubbish, and build from the bottom."

¹ See ante, p. 128.

for it. It was one of the exciting incidents of an intensely exciting crisis.

It was not at first the intention of Congress to confer suffrage upon the emancipated slaves. But the struggle in which it engaged with the President, and the cruel laws which the Southern States enacted with respect to the negro, created a revolution in the public mind at the North, and led to universal suffrage and citizenship, North as well as South.

This is the great constitutional result of the reconstruction period. Its other phases were means to this end, or its results. Grave doubts existed with respect to the constitutionality of the Civil Rights Act. According to the Dred Scott decision, the free negro, although the state of his birth and residence might confer upon him all the rights of state citizenship, was incapable of becoming a citizen of the United States. According to the dissenting opinion of Mr. Justice Curtis, citizenship of the United States only existed through citizenship of a state. If, therefore, in the one case, the United States never had the power to make the colored man a citizen, and if, in the other, only the state could make him a citizen, Congress exceeded its powers in attempting to confer citizenship upon him. The difficulty, however, was met by the Fourteenth Amendment. This was proposed to the states for ratification in June, 1866. Its ratification was proclaimed July 20, 1868.

Its first clause provided: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Thus birth in the United States and subjection to its jurisdiction constitute a person a citizen of the United States; while the addition of residence in a state makes a citizen of the United States a citizen of the state. The Supreme Court has since held that an Indian born in the United States, but a member of a tribe, is not a citizen, for the reason that he was born subject to the jurisdiction not of the United States, but of his tribe.¹ Mr. Justice Miller, speaking for the court,² said that the phrase, "subject to the jurisdiction thereof," was

¹ *Elk v. Wilkins*, 112 U. S. 94.

² *Slaughter-House cases*, 16 Wallace, 36.

intended to exclude from citizenship "children of ministers, consuls, and citizens, or subjects of foreign states, born in the United States." It is difficult to see how the children born here of parents of any nationality, other than that of the Indian tribes within the United States, can be excluded from citizenship. The foreigner who comes here in the official employment of his home government is by comity regarded as subject to the jurisdiction of that government, but the unofficial foreigner is, while here, subject to the jurisdiction of our government. The children of the latter born here seem to come within the exact terms of the Constitution.¹ Treaty regulations with his home government may provide that his children shall not become citizens; but the Constitution is paramount, and the right it confers upon the child born here is manifestly above invasion or diminution by any treaty. We reserve for a subsequent chapter the consideration of various questions involved in the Fourteenth Amendment. Its effect and purpose were to place the negro within the national protection, and confer upon him every right and privilege of a national citizen. It did not confer the right of suffrage upon him, but in connection with the Fifteenth Amendment it led to and procured the right. The ratification of the last amendment was proclaimed March 30, 1870.

The immediate effects of conferring the right of suffrage upon the freedmen were not encouraging. Unscrupulous northern adventurers flocked to the reconstructed states in the hope of political and other advantage. Their meagre estate and transient sojourn caused them to be derided as "carpet-baggers." The negro, naturally regarding the northern Republican as his friend, too readily became his tool and accomplice in schemes of official corruption and plunder. The carpet-bagger was installed in the executive office, and the negro in the legislatures. Under their new state constitutions the debts incurred in aid of the rebellion were repudiated. This gave to some of the states an almost unincumbered capital of credit. The spoliation of the states began. Large appropriations for fictitious or criminally inflated claims were made. State bonds for one scheme or another were issued, and the bonds practi-

¹ So decided. *United States v. Wong*, 169 U. S. 649.

cally stolen. The accession of the negro and carpet-bagger to power was followed by organizations among lawless white inhabitants to expel or punish the carpet-bagger, and to overawe the negro. The most formidable of these organizations was known as the "Kuklux Klan," and its acts of desperate and criminal violence made its name a terror. The national government put forth the utmost efforts to crush it out and punish its members. The national troops were quartered in various parts of the Southern States to preserve order, suppress unlawful assemblages, and secure free and peaceful elections.

Gradually peace and order were restored. As the troops were withdrawn, and the disabilities of those who had engaged in the rebellion were removed by executive pardon or general amnesty, the white inhabitants of the South united to control the elections. They did control them, not by superiority of numbers, but by superior skill and audacity. So long as the law was observed, the negroes could outvote the whites. But the whites disregarded or evaded the law, and when the total of the count was announced the white candidate stood at the head of the list. With the overthrow of the carpet-bagger the negroes were bereft of their political protectors and leaders, and did not themselves have the capacity or vigor to assert and maintain their own rights. With the withdrawal of the troops, in 1877, the republican ascendancy gave place to the democratic, and the white man's government was restored.

Since the accession of President Hayes in 1877, there has, with rare exceptions, been a "solid South" in favor of the democratic party. This has been the occasion of some bitterness of feeling at the North, perhaps more of disappointment and regret over lost prestige and power, than any well-grounded claim that the negroes as a class have not been humanely treated. Their right to vote and to have that vote freely cast and truly counted is unquestioned. Now that this is fully declared and established by law, the best guarantee of the negro's realization of his right must be found in his own appreciation of its value and importance. The appreciation of others who sympathize with him must necessarily prove inefficient; it will be spasmodic and passionate, and will not escape the imputation of

finding its inspiration in a desire to profit by the vote itself. It would be unwise to put him in ward and take his guardian's vote. Nevertheless, such sympathy and interest will prove helpful. The character of the South is at stake, and, unless its morality is abnormal, it cannot long be willing to justify injustice simply because the object of it is unable to escape it.

Meanwhile the sensible and industrious negro has been advancing; the idle and shiftless do not advance. Equality of rights is guaranteed by the Fourteenth Amendment. To give schools to the white children, schools must be given to the black, and they have been. If in everything he is not the equal of the white man before the law, it is because he yet lacks strength to enter all of his inheritance. As the war of the rebellion recedes into the past, the bitterness which caused it, and which it caused, is abating. The negro will ultimately be accorded all that equality of right and of suffrage in this country which he can take and hold without a guardian. How high he will rise in the scale of ability and intelligence is a problem which centuries may be needed to solve. The prejudice which exists against him, simply upon account of his color, is due to the provincial narrowness which we have acquired and inherited, and will be dissipated with time, if we advance in civilization and knowledge of mankind at large. He will find his true place, and will be estimated at his real worth. If nature has so formed his blood and brain and nerve that he is doomed to inferiority, no human law can avail against it, no guardianship will elevate, though it may protect him. In such case the superior race should excel in humanity and kindness. If his inferiority is the temporary result of acquired heredity, of centuries of barbarous ancestry and neglect, he will resume under better conditions his original vigor.

The law at last accords him justice and equality of right, and an equality of privilege with the white man. He may now take that place in life and among men to which, in the words of the Declaration, "the laws of nature and of nature's God entitle him." For his sake the law that was "higher than the Constitution" is made part of the Constitution itself.

Although negro suffrage was forced upon the seceded states,

it was in many of the Northern States only accorded to blacks who had a certain property or freehold qualification. This was rarely required of the white citizen. This disparity of privilege was removed by the Fifteenth Amendment to the Constitution. This provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." No state can now deny the right to vote to any colored man except upon the same terms that it denies it to the white man. Manhood suffrage thus becomes the almost universal rule.

The settlement by arbitration of the claims of the United States against England on account of the depredations committed during the war by the confederate cruiser, the Alabama, was perhaps the most important event of the administration of General Grant. Its history has its proper place in international law, but its importance gives it the weight of a constitutional enactment. The Alabama was purchased in England by the Confederacy. Our minister was advised of the object of her purchase, and he remonstrated with the English government against her departure. England either disregarded the remonstrance or was tardy in attending to it. The Alabama effected her departure from English waters in July, 1862. She ravaged our merchant marine until June 19, 1864, when she was sunk in an engagement with the United States steamer Kearsarge off the coast of France. She had captured or destroyed fifty-eight of our merchant vessels. Our government claimed that England had violated the laws of neutrality in permitting, with notice of her purpose, the Alabama to depart from her shores, and that therefore she should make good the damages which the owners of the destroyed property had suffered. England was slow to respond to this claim. But finally in 1870 she joined with the United States in the formation of a commission of ten members, five to be chosen by each government, authorized to provide suitable measures for the adjustment of all differences between the two governments. This commission provided by a treaty that a tribunal of arbitration

of five members, one to be chosen by each government, one by the king of Italy, one by the president of the Swiss Confederation, and one by the emperor of Brazil, should meet in Geneva and hear the Alabama claims and decide upon them. Three rules for the guidance of the tribunal were agreed upon. These were in substance: First, a neutral nation must be diligent to prevent the fitting out within, and the departure from, its jurisdiction of a vessel which it has reason to believe is to cruise against a friendly power. Second, it must not permit its ports or waters to be used as a base of hostile naval operations, or to obtain recruits of men or military supplies. Third, it must be diligent to prevent such use and the procurement of such supplies. The tribunal should decide whether England had violated either of these rules, and if it should find that it had, it should award damages. The tribunal, after a full hearing, awarded the United States fifteen millions of dollars. The importance of this arbitration consists in its substitution of peaceful discussion and just decision for the arbitrament of war in national disputes. Thus peace has her victories no less renowned than war.

The Electoral Commission which awarded the presidency to Mr. Hayes instead of Mr. Tilden in 1877 is an illustration of the tendency of the American people to exhaust all the resources of peace in the settlement of important and exciting controversies, and thus avert civil war.

The result of the election in Louisiana, Florida, Oregon, and South Carolina was disputed, and the question was who should decide which presidential electors had been chosen and whose votes should be counted. An electoral commission was organized, under an act of Congress passed for the purpose, and it decided the dispute in favor of Mr. Hayes. The justice of the decision was gravely challenged, but its validity was universally acknowledged and gratefully accepted as a happy escape from a perilous situation. Since then Congress has passed an act which it is hoped will be effectual to settle all future difficulties of the like kind.

The administrations of Presidents Hayes and Arthur and

the first administration of President Cleveland were very much alike. These three Presidents were plain and intelligent gentlemen, devoted to the welfare of their country, without ostentation or attempt at brilliant measures. Their best qualifications were honesty of purpose, fair ability, and plain common sense. They took it for granted that the government was happily constituted, and only needed to be honestly and intelligently administered.

The country prospered to an almost fabulous degree.

Probably the most important governmental act of any of these administrations was the passage of the Interstate Commerce Law of 1887. The interstate traffic of the country has grown to be enormous. On the first day of June, 1897, there were 184,428 miles of railroad in the United States, with capital and bonded obligations of \$10,635,008,074, being about an equal amount of each. The gross earnings for the previous year were \$1,122,089,773, of which \$334,990,829 were paid in interest and dividends. Upon seventy per centum of the stock no dividends were paid, and upon sixteen per centum of the bonds no interest was paid.¹

When the Constitution was adopted, interstate commerce was comparatively insignificant. Not until the advent of railroads was there any great change. Railroads were constructed under state laws. The nation only interposed through its Supreme Court in order, when a proper suit was brought, to restrain state interference with interstate commerce or taxation upon it. It did not assume power to regulate. Great abuses arose. It is readily seen that without equal rates for equal privileges, the men or cities especially favored will prosper at the cost and ruin of those who are not so favored. The main object of the Interstate Commerce Act is to make the rates of transportation from one state to another, or across one or more states, truly proportional to the actual value of the transportation, and thus prevent giving to one a favor which must be compensated by extortion from another. The nation cannot regulate the cost of transportation when it begins and ends within a state; for the grant of power to Congress is to regu-

¹ Report of the Interstate Commerce Commission, 1898.

late commerce among the several states. The purpose of the act is just; its administration has been embarrassed by the evasive dishonesty it was devised to counteract, but it is slowly compelling better methods, and educating a rising generation to adopt them. Thus a wise law may be circumvented by the unrighteous against whom it was originally enacted, and be respected by the next generation whose code of morals has been purified by its enforcement.

With the decline of interest in other questions the tariff again rose to prominence. Whether the duty upon imports shall be imposed for revenue only, or to protect our productions against foreign competition in addition to the provision for the necessary revenue, was vigorously debated. The philosophical exponents of political economy insisted that the tariff should be for revenue only. The practical effect of such a policy is free trade. The constitutional objection was seldom urged; the question became one of business expediency and common honesty. The free trade argument in brief was that no tax should be levied except for the use of the government; that any tax upon the consumer for the support of the producer is a form of extortion or robbery; that if the duty is limited to those articles which we do not produce, such as tea, coffee, spices, etc., then the government receives the entire avails of the tax, less the cost of its collection. But if the duty is imposed upon imports of a kind which we also produce, as upon cloth, iron, sugar, etc., then the government receives the tax upon the imported portions only, and the home producer receives it also upon his production of the like articles to the extent that the duty upon the imported articles enables him to increase his price upon his own; that such increase of the price upon the domestic article is a tax upon the domestic consumer extorted by law from him for the benefit of the producer; that its practical effect is to make the protected producers dependent upon their legalized extortions, and not upon the intelligence, enterprise, and skill which competition with other countries would evoke and quicken. These views obtained wide support, and found some expression in an act to modify the tariff in the second administration of President Cleveland, but the protec-

tive system prevailed even in that act, and was fully restored in President McKinley's administration.

On the other hand the protectionist rejected free trade as an impracticable theory and unsuited to American conditions. He urged that the protective system encourages capital, skill, and labor to embark in manufacturing the fabrics for which our fields, forests, and mines afford the raw materials ; that thus the avenues of industry are multiplied, capital finds investment, skill is stimulated and rewarded, the resources of the country made available, the domestic markets enlarged and improved, and the self-dependence, wealth, and prosperity of the people increased. These general views also obtained wide acceptance. We cannot enter upon the mass of details which are employed to support or refute either contention. The impartial reader of the enormous bulk of argumentation will perceive that the success of the champion of either side depends in part upon the facts adduced, and in part upon the facts suppressed. The factors bearing upon the utilitarian phase of the argument are so many that it is not strange that a century of experience and discussion has not sufficed properly to adduce and correlate them all, and advance to an irrefragable demonstration. It is true that a protective tariff imposes a tax upon the consumer for the benefit of the producer. On the other hand it is true that the proper protection of home industries results in a general benefit, in which the consumer participates. It is not easy to identify the particulars or amount of the benefit, but the general proposition cannot be easily disproved. The real question is, what is the proper protection ? a statute to keep inferiority on its feet, or free trade which sends superiority to the front ? In the case of a new industry in a new field, a temporary statute may be proper. In an established industry, if it cannot stand upon its merits, other industries should not be forced to contribute to it.

Behind the question of mere utility lies the moral question whether the government has the right to permit the manufacturer to take a specific sum from the consumer against his will, and leave him no other return or compensation than his participation with every other citizen in the alleged general benefit.

The higher wages of American labor afford the excuse or justification for protection to American manufactures. Such labor has always commanded a higher price than European labor, for the reason that the price of labor both here and there is regulated by the law of supply and demand, but here the supply and the price have been influenced by the proportion of agricultural returns to the capital and labor invested in agriculture. In a new country the carpenter, blacksmith, and other artisans, who must render their services in the locality where they are needed, receive a wage proportioned in some degree to the bounty of agricultural returns from the cheap lands. They share in the prosperity of the country. It would be impossible at the outset to obtain the necessary labor for other manufacturing operations unless the same rate of wages should be paid. But the foreign producer employs his labor at a decreased price. Hence, unless the government devises some method of compensation for the inequality in the price of labor, it is plain that the American must delay his competing manufacturing undertaking until the price of labor is the same in both countries, unless he can by superior skill and appliances, or the more intelligent or cheaper direction of larger capital, overcome the difference in the price of manual labor. Of course the consumer says, government has no right to deprive him of the privilege of buying in the cheapest market, nor to create individual loss in order to promote the gain of other individuals and the general gain.

The free trade system will be greatly extended. Although our markets are great, and we have the right to exclude foreign wares from them, still the markets of the world are greater. The inventive and productive capacity of our people is so far superior to that of any other people, and so far in excess of our own needs, that we need the markets of the world for our manufactures. To obtain an open door, we must concede it. Experience shows that the competition among American producers tends to reduce prices to the lowest reasonable amount, often much below that of the imported article, with the tax added. The tendency of events is to make a protective tariff obsolete. It is becoming practically useless except as to those imports of

which manual labor forms the larger part of the value, and such raw materials for manufacturing as we produce.

The protective system is liable to great abuse. Commercial selfishness strains every point to gain an advantage, with slight regard to justice. While the protection of capital is the surety for the employment of labor, the protection that rests upon superior merit is surest ; that which rests upon party politics and temporary statutes is unstable, and thus unfavorable to the true interests of labor.

Closely connected with the tariff is the question of federal taxation. The states resort to direct taxation, the nation to indirect. In the states property is made the subject of taxation ; the theory being that every one should be taxed in proportion to the amount of his property. In the nation every one pays a tax in proportion to the amount of his ultimate consumption of dutiable articles. Unless care is taken in laying the imposts, the man who has the most children pays the most tax. The tariff therefore ought to be as light as possible upon the food and clothing and other necessities of the poor man, and more onerous upon the articles which the wealthy consume. In this way the national tax may be levied in great part upon those who are able to pay it. In a republic where universal suffrage has so great power, and may if exasperated make reprisals, it is folly for wealth to seek to escape from its just contribution to the support of the government.

During the presidency of Benjamin Harrison the people of Hawaii were encouraged by the administration to overthrow the monarchy governing them and to establish a republican government in its place, the ultimate object being annexation to the United States. President Harrison retiring before annexation was completed, Mr. Cleveland, who acceded to a second presidential term, disapproved of the part taken by the United States, alleging that it was discreditable to our national honor, and he attempted by peaceful measures to restore the monarchy, but without success. Annexation was, however, delayed until after Mr. McKinley had succeeded to the presidency, when upon August 12, 1898, it was accomplished.

Under Mr. McKinley's administration the United States, in 1898, resolved to intervene in the civil war waging in Cuba between Spain and her Cuban subjects. The professed object of this intervention was to relieve Cuba from Spanish misgovernment and oppression, and to enable her people to govern themselves. War was declared against Spain. Our navy soon destroyed the Spanish fleets, both in Cuban waters and in the bay of Manila, the chief port of the Philippines. A treaty of peace followed, in which Spain surrendered Cuba, Porto Rico, and the Philippines to the United States, the United States paying \$20,000,000 to Spain. Military governments were established in Cuba and Porto Rico. In the Philippines the inhabitants were also in revolt against Spain, and as the United States would give them no definite promise of self-government, they refused to submit to its jurisdiction. The unsubmissive inhabitants were finally overcome by our arms. We permitted and assisted Cuba to establish a republican form of government, but retained jurisdiction over Porto Rico and the Philippines. The intervention of the United States in behalf of Cuba, judged by its avowed purpose and actual result, is a rare example of very great helpfulness by one people to another without any exaction of compensating advantage.

The abstract right of the United States to intervene in behalf of the Cubans and against Spain was a question of morals and of international law. So far as constitutional law is involved, Congress had the power to declare war, and the exercise of the power is the nation's declaration of the right. International law does not exist in the sense that constitutional law does. Except as it is declared or implied in treaties between two or more powers, international law simply consists of such rules of action as enlightened nations usually observe in their intercourse with each other, and in the opinions of the wisest writers upon the subject. The great powers of the earth in matters of the gravest concern to themselves act according to their own sense of interest or duty, whatever academic writers upon international law may say. In this sense the United States assumed to act, and its action was without protest on the

part of any great power other than Spain. This absence of protest is the most authoritative sanction of its right to intervene that the nature of the case affords. It implies the opinion of the nations that the present state of international law justifies the intervention.

CHAPTER XIII.

THE INFLUENCE OF THE SUPREME COURT UPON OUR CONSTITUTIONAL DEVELOPMENT AND GROWTH.

It is impossible to comprehend the development and growth of our constitutional system without taking into consideration the position and influence of the Supreme Court of the United States. This body is the final expounder of the Constitution in all cases which can be presented in the form of a suit at law. The expounders of the Constitution hold an office under it of little less importance than that of its framers. The framers discharged their office and rested from their labors. The expounders are constant in their office and are seldom at rest. Judges die, but the Court is immortal. The Constitution speaks as of the age in which it was written, more than a century ago. The Court expounds it in the language of its own age, holding fast to the old words and powers, but expanding them to keep pace with the expansion of our country, our people, our enterprises, industries, and civilization. Great controversies arise over questions and conditions impossible for the framers of the Constitution to have anticipated. What would they have thought, if one had asked them whether a state law regulating the transmission or taxation of telegraphic messages between Kansas and Nevada would be unconstitutional, because encroaching upon the power of Congress to regulate commerce among the states? Plainly, a constitution made a century ago might well be expected to prove inadequate to the wants of the ever increasing population of the United States. That such is not the case is remarkable evidence of its wisdom, and also of the wisdom of its exposition. It will be instructive to glance, even hastily and imperfectly, at the history of the Court, and its function and influence in shaping our constitutional development and growth.

In the beginning, the judicial was apparently the least important of the three departments of the government, and in the opinion of many has always remained so. But the Court has made our dual system of government possible, and in the end harmonious and valuable. It was inevitable when the functions of sovereignty were parceled between two jurisdictions, and, in so far as they were reserved to the people, denied to either jurisdiction, that controversies and jealousies should arise; that there should be conflicting interpretations of the Constitution, rival partisans of national and state supremacy, encroachments by one jurisdiction upon the other, and sometimes open and undisguised contempt of rightful authority.

The framers of the Constitution would have been justly subject to the reproach of devising a system fraught with the causes of its own destruction, if they had not also devised a tribunal to settle the contentions which the system was sure to generate.

The Judiciary Department was intended to furnish such a tribunal. In the beginning, its opportunity and influence were slight; its place in the government feeble and inconsequent. Darkness and uncertainty enveloped its powers and jurisdiction, invited challenge, and compelled hesitancy. The Court had to await its opportunity, and then to ascertain its jurisdiction and the scope of its powers. The problem was whether it would ascertain aright; whether it would clearly see, and clearly define, and clearly and rightly use its powers. It had not only to wait for the opportunity to develop and assert its own power and jurisdiction, but also to wait for the recognition of them by the people. It was overshadowed in the early years of the government by the immediate, active, and dominant influence of the other departments. It gave, during many years, but feeble promise of its ultimate influence in shaping our constitutional growth.¹ But it is plain

¹ Chief Justice Jay resigned in 1795, and was tendered reappointment by President Adams in 1800. In declining acceptance he wrote: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."

now that we are largely indebted to the Court for our continued existence as a nation, and for the harmony, stability, excellence, and success of our federal system.

It is true that it has not had the command of armies and navies, it has not had the power of the purse; it could not make laws or repeal them. As has been well said : " It is a power which has no guards, palaces, or treasuries, no arms but truth and wisdom, and no splendor but its justice and the publicity of its judgments." The supremacy of the Court is the result of a natural growth, of a constant accumulation of influence, with little loss and no decay. True constitutional principles, when once correctly ascertained and interpreted, remain forever. We have not only the wisdom and learning of the magistrates who sit in the judgment seat to-day, but we have the vast store of the decisions of their predecessors. We are, no less than the Court itself, the heirs of the wisdom embodied in the recorded opinions of those who have gone before. The Court has all the influence due to itself, and all that is due to the wisdom stored up from the beginning. No other department has so rich an inheritance. Decisions and opinions, which, in the day of their delivery, may not have received the respect due to their merit, in the end are sure to receive it. Truth and wisdom are the more clearly perceived and recognized, after time has dissipated the mists of passion and prejudice which at first obscured them. The affairs of administration and legislation, however imposing and commanding in their day, are often as ephemeral as the day itself. The influence of the Court bides its time; the later generation quietly accepts the wise rule which the prejudice of the earlier repudiated.

The Court is happily constituted. A body of learned, able, and virtuous men are selected for judges. They realize their duties and responsibilities, and rise, if need be, to the occasion. It is their life-work. The traditions and habits of their order become their guides and guards. If they are fit for their place, they have no ambition for other places. They constitute the nation's reserve of dispassionate wisdom and virtue, for use in seasons of passionate heat and controversy.

The influence of the Court upon the other departments of the government, and upon the nation, state, and people, is usually only indirect, but that fact, strange as it may seem, has rendered its influence more commanding. Its direct power and influence are only exercised upon the persons and property affected by the cases before it. The Court sits to decide cases and controversies between litigants, that is, lawsuits. The Court declares the law for the sole purpose of applying it to the case before it, in order to decide it correctly. Strictly speaking, when the case is decided, nothing more is decided or settled than the suit between the parties to it; as, for example, that the plaintiff can or cannot recover a certain sum of money from the defendant. No parties are before the Court besides the litigants, and no other parties are directly bound by the judgment or decision. Such being the case, it would seem that the decision could have but little influence upon any other persons or matters. This is so with respect to the greater part of the cases and controversies brought before the Court. But we need to look further. The Constitution, art. 3, sec. 2, declares that the judicial power of the United States "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority," etc. Now, although it may be true that the decision of a case is only the decision of the dispute or contention between the parties, yet in order to decide it, it may be necessary to determine what a certain clause or expression in the Constitution means. If it means what either of the parties contends, that party will probably win his case.

Although the Court only interprets the clause or expression of the Constitution in order to determine which party shall prevail, the interpretation declared by the Court is not made without full examination and deliberation, nor until after argument upon both sides has been heard. These arguments are usually made with all the ability and learning which the private interests at stake can stimulate and command. The interpretation of the Constitution, when thus made by the Court, is probably a true one. When such true interpretation is once made

and declared, there is no need of making it otherwise or different in any other case. Indeed, there can rarely be any excuse for unsettling it. The practical result is, as it inevitably must be among sensible people, that the constitutional interpretation once deliberately made and adjudged by the Court remains adjudged and settled. If any case subsequently comes before the Court involving the same question, the decision already made becomes the rule of decision for the later case. The decisions and opinions of the Court in the cases decided by it are published in its volumes of reports, and thus not only become known, but are permanently preserved for future reference and guidance. If the question already decided by the Court again arises between individuals, their counsel, if learned in the law, will advise them to respect the decision already made and avoid litigation. If, notwithstanding such advice, the question is brought before the Court, it will in all probability repeat its former decision.

If the same question afterwards comes before the Congress of the United States, or before any of the executive departments, both Congress and the departments will, if they be prudent, respect and conform to the decision. Why should they do this, if independent and coördinate departments of the government? Because, if they enact a law, or make an order, in violation of the Constitution as the Supreme Court has interpreted it, they invite the citizen to hazard and lose his liberty or property upon their action. Thus, if the Supreme Court decide that a certain order of the President is no defense to a private citizen or to a public officer acting under it, for the reason that the President has no constitutional power or authority to make it, it follows that a prudent regard for the rights of the citizen or officer will prevent the President from repeating the like order.¹ The President will not require the citizen or officer to incur the risk of litigation in which he is sure to be defeated. In like manner, if the Supreme Court decide that an act of Congress, or of a

¹ The commander of a ship of war was held liable in damages to a person injured by him in the execution of orders given him by the President; the Court holding that instructions not authorized by law could not legalize a trespass. (*Little v. Barreme*, 2 Cranch, 170.)

state legislature, is unconstitutional, neither Congress nor the state legislature would reënact such a law; for thereby they would lead other persons into a litigation to their injury. In addition to these considerations, the respect accorded to the decisions of the highest court in the nation is very great, and is practically controlling. Thus it is that in many cases and questions the judiciary has attained a superiority over the other departments of the government and also of the states; not in exact strictness, but as the consequential result of the decisions of the court in cases between individuals, and also because of the prudence of the departments, and of the states. This result is perfectly natural. It has thus come to pass that the Court has acquired enormous influence,—controlling where it has not assumed control, and obeyed where it has issued no order.

This almost inevitable consequence has not been allowed to obtain without repeated and vigorous protest,—a protest which is constantly renewed, but which will be renewed in vain so long as the Court rules departments and states more by its influence than by its power.

President Jefferson was greatly annoyed because the Supreme Court in *Marbury v. Madison*,¹ a case to which reference will be made hereafter, reviewed an act of Congress, and the action of the President under it. He characterized the decision as “an irrelevant dissertation of the Chief Justice and bad law.” He at another time declared:—

“That each department of the government is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution and the laws submitted to its action.”

This proposition is theoretically correct. The Court, in *Dodge v. Woolsey*,² itself declares:—

“The departments of the government are legislative, executive, and judicial. They are coördinate in degree to the extent of the powers delegated to each of them. Each in the exercise of its power is independent of the others, but all rightfully done by either is binding upon the others.”

In another case, *Mississippi v. Andrew Johnson*,³ application

¹ 1 Cranch, 137.

² 18 How. 347.

³ 4 Wallace, 500.

was made to file a bill against the President to enjoin him from enforcing the reconstruction acts in the state of Mississippi, upon the grounds that those acts practically superseded the government of the state and subjected it to military authority under the President. The Court denied the application, and said that Congress is the legislative department of the government, "the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."

The distinction is thus clearly intimated between the power of the Court to interfere with the action of the other departments, and its power to determine the legal effect of that action upon the rights of others when performed. We can readily believe that neither department would repeat the action, after the Court had once decided that because of its unconstitutionality it was void and conferred no rights, and afforded no protection.

President Jackson vigorously asserted the same doctrine which President Jefferson had announced. The Supreme Court had decided that the charter of the Bank of the United States was constitutional. The charter was about expiring, and Congress passed a bill renewing and extending it. President Jackson said in his veto message:—

"Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges when it may be brought before them for judicial decision. The decision of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executive when acting in their legislative capacities."

No valid technical exception can be taken to this reasoning,

when applied by the President, or by Congress, to justify a veto of a bill or a vote against it. A rejected bill can never come before the Supreme Court for its decision, and therefore no officer or individual can ever have his rights or property dependent upon the construction which the Supreme Court may entertain respecting such a bill. President Jackson applied his doctrine in support of a veto, and therefore kept strictly within his constitutional right. But suppose the Supreme Court had held that the old charter of the bank was unconstitutional, and the President and Congress had, notwithstanding the decision, granted the new charter, and the public had disregarded the Supreme Court and embarked their money in the new bank, it is easy to see that immense losses would have occurred, and that the President and Congress would have been justly blamable.

But the true reason why the decisions of the Supreme Court should be respected by the President and by Congress is that its judgment, made in the cases brought before it, is the highest authoritative expression of the national will and understanding respecting the interpretation of the Constitution and the laws which we are able to obtain. The judgment of the highest court declaring the meaning of the law is intended by our form of government to be conclusive respecting that meaning. That is so, in the very nature of the case. The judges are learned in the law; they are its impartial interpreters; the executive, the Congress, the people, are less learned, less reliable, and more influenced by passion, prejudice, and interest. The welfare of the community requires that we shall have the best obtainable interpretation of the Constitution and laws, and we have therefore provided the best tribunal we could devise to secure it; and hence when this tribunal gives us what it was appointed to give, it is imprudent for President, Congress, or people to substitute for it their own interpretation, which may be based upon interest, partisanship, or prejudice.

Moreover, the meaning of the Constitution and laws should be fixed and stable. It is the peculiar excellence of the courts that they are stability itself, as compared with the other departments. Truth is required; it is the duty of the courts to ascertain and declare it, if necessary to their judgments. The

judges hold office for life; thus all possible stability which mortality permits is given to the personality of the Court. The other departments change with the changes in the public temper and interest. Safely so, so long as we have a government of laws whose meaning and force are not dependent upon these changes.

Grant that the Court is occasionally in error; two remedies exist: one an amendment to the Constitution,—a remedy applied in the Eleventh, Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution; the other, a reconsideration of its decision by the Court itself,—a reconsideration which in cases or questions of great moment and inherent doubt is sometimes permitted,¹ and then will be made upon solemn argument,—an argument which will be presented with all the ability and force of the keenest and strongest minds, quickened and strengthened by every consideration of interest, feeling, and ambition.

Mr. Madison was originally of opinion that the Congress had no power to charter the Bank of the United States. Nevertheless, in 1817, as President, he approved the bill for its re-charter. He gave as the reason for his action that he felt it to be his duty to yield his own opinion to the vast and uniform weight of congressional and national opinion for twenty years.

He wrote in 1832:—

“The act originally establishing a bank had undergone ample discussions in its passage through the several branches of the government. It had been carried into execution throughout a period of twenty years, with annual legislative recognitions, and with the entire acquiescence of all the local authorities, as well as of the nation at large. A veto from the executive under these circumstances would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention.”

The executive and legislative departments may, without technical impropriety, follow their own judgment with respect to the constitutionality of their action, notwithstanding the contrary opinion of the Court previously expressed in a similar case,

¹ *Pollock v. Farmers' Loan and Trust Co.* 158 U. S. 601.

whenever their action cannot result in a litigation to be decided by the Court. Such action by the departments is rare.

President Lincoln, in his first inaugural address, referring to the then recent Dred Scott decision, said :—

“ I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding upon the parties to that suit, while they are also entitled to very high respect and consideration in all parallel cases by all departments of the government. . . . But if the policy of the government, upon the vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court the moment they are made, as in ordinary cases between parties in personal actions, the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal.”

The Dred Scott decision was at variance with the sentiment of the anti-slavery portion of our people ; they reversed it by amendments to the Constitution, but this was one of the fruits of the civil war.

In the sense that an amendment to the Constitution can reverse the decision of the Court upon a question of constitutional construction, President Lincoln was speaking the language of prophecy, and within reasonable limits. But so long as the Court adheres to the construction pronounced, it will be useless to exclaim against it, with respect to action which will bring litigants before the Court. The instances cited are illustrative of the opposition which the Court has overcome by its constantly growing influence, upon its way from comparative insignificance to recognized supremacy.

Mr. Madison in 1834, perhaps realizing what our subsequent experience has made clearer, the danger of anarchy which must result if the decisions of the Supreme Court should not be respected by the other departments of the government, wrote :—

“ Without losing sight, therefore, of the coördinate relations of the three departments to each other, it may be expected that the judicial bench, when happily filled, will most engage the respect and reliance of the public as the surest expositor of the

Constitution, as well of questions within its cognizance concerning the boundaries between those of the several departments of the government, as in those between the Union and its members."

While the Court will not in any way attempt to control executive action, that is, action which involves judgment and discretion, but will limit its judgments to declaring the validity of acts after they have been performed, and rights are asserted under them; still the Court will, after the judgment and discretion of the executive officer have been exercised in favor of an individual, direct the performance by the executive officer of the purely ministerial acts necessary to place the individual in possession of his rights, or of the title to them. Thus, when Mr. Schurz was Secretary of the Interior, a patent for lands had been signed by the President, sealed and recorded, and was ready for delivery. Mr. Schurz caused delivery to be withheld, but the Court compelled delivery upon the ground that the proper departments had exercised their judgment and discretion and had awarded and executed the patent, and thereupon the claimant was entitled to it; and as nothing remained to be done but the mere act of handing him the paper, it was proper for the Court to direct that act to be performed.¹ This exception to the general rule was adopted after the maturest consideration, and serves to illustrate the careful observation of the rule itself.

The Supreme Court early recognized the separation of the judicial from the other departments of the government by its refusal to perform any other than judicial labor. In 1792 Congress passed an act requiring the circuit courts to examine into claims for pensions and certify to the Secretary of War such as they should find to be valid, together with the amount to be allowed. The courts refused to perform this function because it was not a judicial one in the sense of the Constitution. The judicial power there mentioned is the power to determine cases and controversies in the nature of litigations. Several of the judges, however, consented to act, out of court, as commissioners, from sympathy with the meritorious character of the

¹ *United States v. Schurz*, 102 U. S. 378.

claims. But as now understood the judges could not act as commissioners, for the reason that such an office is distinct from the judicial office, and to exist must be specially created.¹

It follows from the nature of the judicial office that the Court has no physical power to enforce its own judgments. Its duty is to pronounce judgment in the cases brought before it. It may declare how and in what manner the judgment shall be executed, but it is for Congress by law to provide the force necessary to execute the judgment. The theory is that Congress will provide amply for the fullest execution of the decrees of the Court, and that behind the officers charged with this execution stands the whole physical force of the nation. If obedience is withheld or delayed, the Executive Department will summon as much of this force as may be necessary. The fact that this is so ordinarily makes the employment of force unnecessary.

Theoretically, the Court is absolutely powerless. Practically, the whole force of the nation is at its bidding. President Jackson, however, refused to enforce its judgment in the case of Worcester against the state of Georgia.² In that case, the state of Georgia had made a law, subjecting to punishment all white persons residing within the limits of the Cherokee Nation who had not obtained a license from the state to reside there, and had not taken an oath of allegiance to the state. This law authorized the arrest of such persons within the limits of the Cherokee Nation, their forcible removal therefrom, and their trial for the offense by the courts of the state.

Worcester was a native of Vermont, and he was sent, under the permission of President J. Q. Adams, as a missionary to the Cherokee Nation by the American Board of Commissioners for Foreign Missions. He there engaged as a preacher and teacher among the Indians. He obtained no license from the

¹ United States *v.* Ferreira, 13 How. 40. President Washington sought to obtain the opinion of the Justices of the Supreme Court respecting the rights of France and her enemies under existing treaties to use the United States as a base from which to dispatch offensive expeditions against each other, to establish prize courts within our territory, and upon various questions of international law. The judges declined to answer upon the just ground that they should not in advance pass an opinion upon a case or question which might come before them.

² 6 Peters, 515.

state. The state of Georgia claimed that the territory occupied by the Cherokee Nation was within her jurisdiction. It was within her geographical limits. But the United States had made a treaty with the nation, and the treaty recognized the nation as a distinct, separate political community, authorized to govern within its own territory, wholly exempt from the control of the state of Georgia. The state of Georgia caused Worcester's arrest within the limits of the nation, and he was tried in the state court for a violation of the state law, and was sentenced to imprisonment for four years in the state penitentiary. The case was brought before the Supreme Court of the United States, and that Court held that the treaty was the supreme law, and reversed the conviction. Worcester ought thereupon to have been set at liberty. But he was not. This was in 1833. President Jackson took sides with the state. He is said to have remarked, "John Marshall has made his decision, now let him execute it." Worcester remained in prison until the governor of the state, conceiving that he had won the victory, pardoned him. The fact was, the state was covetous of the lands occupied by the Cherokees, and the state sovereignty doctrine of that day afforded a basis upon which she waged and won her battle against the United States. Finally the Cherokee Indians were persuaded by the United States to leave the state of Georgia, and take up their abode in the Indian Territory upon the eastern slope of the Rocky Mountains. The persuasion was reinforced by money and the presence of several thousand troops under the command of General Winfield Scott.

It was obviously the duty of President Jackson to give his support to the judgment of the Supreme Court, under his constitutional obligation to "take care that the laws be faithfully executed." But how far he should risk armed collision by the United States with the state of Georgia in enforcing the judgment was a prudential question, in respect to which it was his right and duty to exercise his own judgment.

In another case in that state a man was convicted by the state court of murder, alleged to have been committed in the territory of the Creek Indians. The United States had a treaty with this tribe also, and by this treaty the tribe, and not

the state, had jurisdiction to try the murderer. After the man was convicted, the Supreme Court issued its writ in order that the case might be reviewed in that Court. This action by the Supreme Court was treated by the state of Georgia as insupportable arrogance and pretension, which a proper sense of her independence and sovereignty required her to resent and resist. When the writ from the Supreme Court was served, commanding the state court in the usual form to make return to the former court of its judgment, and of the proceedings which led to it, the excitement in the state became very great, and found expression in extravagant language. The legislature of Georgia adopted the following resolution : —

“ *Resolved*, That his excellency, the governor, be and he is hereby authorized and required, with all the force and means placed at his command by the Constitution and laws of this state, to resist and repel any and every invasion, from whatever quarter, upon the administration of the criminal laws of this state.”¹

The state court refused to make the return. The Supreme Court had no power to enforce its writ. The President of the United States did not choose to enforce it, and the prisoner was hanged.

As late as 1855, in the state of Wisconsin, the authority of the United States Supreme Court was practically and successfully nullified. The case arose under the Fugitive Slave Law of 1850. One Booth was charged before the United States commissioner with having, in March, 1854, aided and abetted at Milwaukee the escape of a fugitive slave from the deputy marshal. Booth was held to bail to appear before the District Court of the United States for Wisconsin, and answer the charge at the following July term. But before the District Court met, Booth’s bondsmen, probably to aid his escape, surrendered him again to the marshal, who, upon the order of the United States commissioner, lodged him in jail. Booth then applied to a state judge for a writ of *habeas corpus*, which was issued, and upon a hearing this judge discharged him, holding that the Fugitive Slave Law was unconstitutional. This deci-

¹ 39 Niles’s Register, 338.

sion was brought by appeal before the state court and affirmed. From the judgment of affirmance an appeal was taken to the United States Supreme Court. But before the case was reached for argument in the latter court, Booth was indicted in the District Court of the United States for aiding and abetting the escape of the slave from the custody of the marshal. He was tried, found guilty, and was sentenced to pay a fine of one thousand dollars, and be confined in jail one month, and until the fine should be paid. Booth, now being in jail, applied to the supreme court of the state for a writ of *habeas corpus*, and the state court granted the writ, and, notwithstanding his conviction and sentence in the District Court of the United States, he was discharged, the state court again holding the Fugitive Slave Law to be unconstitutional. The Attorney-General of the United States then applied to the Chief Justice of the United States, and obtained a writ of error commanding the state court to make return of its judgments and proceedings, to the end that its decision and judgment upon the *habeas corpus* be reviewed. But the state court, following the Georgia precedent of a quarter of a century before, refused to obey the writ, and directed its clerk to disregard it, and it was disregarded. The Attorney-General, thereupon, procured copies of the record and proceedings and brought them into the United States Supreme Court, and that court, as in the case already referred to of Worcester against the state of Georgia, did review and reverse the decision and judgment of the state court. Booth, however, never appeared in the United States court, nor submitted to its authority, and consequently never was punished according to the sentence of the District Court.¹ The action of the Wisconsin court was just as revolutionary as the similar action in the Georgia cases. In both states popular opinion defied the supreme law.

In 1861, at the outbreak of the rebellion, one Merryman was arrested by military authority in Maryland for supposed treasonable practices. Chief Justice Taney issued a writ of *habeas corpus* to inquire into the cause of his imprisonment. President Lincoln directed the officer to refuse obedience to the writ,

¹ *Ableman v. Booth*, 21 How. 506.

and declared the writ suspended in his case. The Constitution provides that "the privilege of the writ of *habeas corpus* shall not be suspended, except when, in cases of rebellion or invasion, the public safety may require it."¹ Congress was not then in session. The Chief Justice held that Congress only could direct the suspension of the privilege of the writ.² But the President held otherwise, and as he had the power, he refused to yield obedience to the order of the Chief Justice. Congress subsequently sustained the President.

A becoming respect for the authority of the judiciary required the President to yield to the authority of the Court in a case in which it clearly had jurisdiction. But which should prevail in a great emergency, respect for the judiciary or the public safety? Laws are silent in war and great public danger. The wise ruler who is charged with the public safety must, if Congress is not in session, seize with quick hand the means to avert war and restore peace.

These refractory cases, interesting as they are, are exceptions. They serve to illustrate the fact that the judicial power and influence, in the formative stages of our constitutional growth, did not always command complete respect, or were thrust aside under pressure of popular opposition.

Mr. Hamilton, in the seventy-eighth number of "The Federalist," remarked : —

"The judiciary from the nature of its functions will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty."

¹ Art. 1, sec. 9.

² Tyler's C. J. Taney, 646.

He further remarked :—

“The judiciary is beyond question the weakest of the three departments of power ; it can never attack with success either of the other two, and all possible care is requisite to enable it to defend itself against their attacks.”

It is because the Supreme Court has by its wisdom and justice gained the confidence of the people, that it has proved to be really greater than the power actually possessed by it. No higher tribute can be paid it.

The Supreme Court has a very narrow constitutional guarantee of position and jurisdiction. The third article of the Constitution provides for its existence and limits its jurisdiction. The first section provides that “the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” Thus the Constitution enjoins upon Congress to ordain and establish *one* Supreme Court. Congress may establish it as it thinks proper. It may add to or take away from the number of its judges. This power is undoubtedly large enough to enable Congress greatly to impair, if not substantially to destroy, this Court. Congress may also tamper with and practically destroy its most important jurisdiction.

The second section provides that “the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority,” also to cases of admiralty and maritime jurisdiction ; but with respect to these cases it is provided that the Supreme Court shall have appellate, not original jurisdiction, both as to law and fact, “with such exceptions, and under such regulations, as the Congress shall make.” The litigation which comes before the Court, involving constitutional questions, arises in “cases under this Constitution.” Since Congress has the constitutional power to make such exceptions to the appellate jurisdiction of the Court as it thinks proper, it follows that the great jurisdiction specified in the Constitution is by the Constitution itself subjected to congressional exceptions and regulations, and therefore the Court is largely at the mercy of Congress.

In a rapid sketch of the history of the Court, we shall see that Congress has, in a few instances, tampered both with its organization and its jurisdiction. Fortunately, the instances are rare. The efficiency of its organization and the scope of its jurisdiction have in the main been carefully regulated and preserved.

On the 24th day of September, 1789, the act organizing the Supreme Court was passed. The Court was constituted with a Chief Justice and five associates. John Jay was appointed the first Chief Justice by Washington. Webster said of him that when the ermine fell upon his shoulders, it touched a being as spotless as itself. The Court first convened in February, 1790, in New York. It does not appear from the reports that any case then came before it. Jay remained Chief Justice until 1795, when he resigned to become governor of the state of New York. A chief justice in our day would hardly do this. His judicial duties were so few that he found time, in 1794, to accept the mission to England to negotiate the treaty so famous in history as "Jay's Treaty." John Rutledge of South Carolina was appointed to succeed Jay, he served one term, but he had been so pronounced in his opposition to the treaty, and so bitter in his denunciation of Jay himself, that the federal Senate refused to confirm him. William Cushing of Massachusetts, one of the associate justices, was then nominated by Washington, and was promptly confirmed; but he preferred to remain associate justice, and Oliver Ellsworth of Connecticut was made Chief Justice. He held the office until 1801, when John Marshall of Virginia was appointed by President Adams. Marshall held the office thirty-four years. He was known at the time of his appointment as an ardent Federalist. In our time he is known as "the great Chief Justice." Roger B. Taney of Maryland was the next incumbent. He was appointed by President Jackson. His political enemies styled him a renegade Federalist, and said that his appointment was his reward for his obsequious obedience, while Secretary of the Treasury, to President Jackson.¹ But Taney, despite the Dred Scott decision, was an honest man and a great judge. His opinions are models

¹ *Ante*, p. 183.

of lucid and orderly discussion, and are of admirable literary form. He held the office for twenty-eight years, and upon his death in 1864, President Lincoln appointed Salmon P. Chase of Ohio. Chief Justice Chase died in 1874. President Grant then appointed Morrison R. Waite of Ohio. He died in 1888. Melville W. Fuller of Illinois is the present incumbent, his appointment having been made by President Cleveland.

Of the associate justices there is but little to be said. Indeed, what more need be said of a body of learned and virtuous men, sworn "to administer justice without respect to persons, and do equal right to the poor and the rich," than that they live and labor in the earnest and faithful discharge of their solemn obligations?

In 1807 an associate judge was added by Congress; two more were added in 1837, and one in 1863. They were added to enable the Court to perform the work of the circuits, which increased with the growth of the country.¹

In 1865 Judge Catron died. Andrew Johnson was President. Congress had entered upon that long struggle with the

¹ In February, 1801, nineteen days before the expiration of the term of John Adams, Congress amended the judiciary act by providing for the reduction of the Supreme Court judges from six to five, and by creating sixteen circuit judges. The ostensible object was to provide for the wants of the people, and to relieve the Supreme Court judges from traveling the circuits. President Adams promptly appointed sixteen leading Federalists as circuit judges. As the judges were to hold office for life, the judiciary department of the government was thus supposed to be placed above the reach of the Jeffersonian party.

Jefferson swept away this new creation. The new Congress, of which his friends had control, repealed the act. The Federalists in vain exclaimed that the Constitution was violated. Their position was unsound since the power to create inferior courts, which the Constitution conferred upon Congress, could be exercised only by enactment, and the power to enact embraced the power to repeal. Jefferson and his party feared that if a case should be brought before the Supreme Court involving the question, the Court would decide the repealing act to be unconstitutional. To prevent such a result, Congress in the repealing act suspended for more than a year the sessions of the Supreme Court itself. It held no session in the year 1802. It was during this year that Marshall elaborated his great opinion in *Marbury v. Madison*. The office was effaced, and the judges had no duties to perform, and no appropriation was made for their salaries. They did not see how to make a case for judicial determination, and they memorialized Congress, asking that they be assigned to duty, and that Congress make provision for bringing the question of their right to the office and to compensation before the Court. Congress refused, and this ended the matter.

President with respect to the reconstruction of the seceded states, which has been previously mentioned. Congress thought proper to govern these states by military commission until they should conform to certain prescribed requirements, and adopt the Fourteenth Amendment proposed to the Constitution. The President vetoed the acts of Congress, and Congress passed them over his veto. It was probable that in some form the constitutionality of these acts of Congress would come before the Court for decision, and Congress did not wish the President to fill Judge Catron's place. Accordingly a law was passed over the President's veto, forbidding the filling of any vacancy until the number of associate judges should be reduced to six; the whole number of associates having previously been nine. This was undoubtedly a violent exercise of partisan power, but the peril that impended was the overthrow of the whole scheme of reconstruction.

Judge Wayne died in 1867. The Court, now constituted of the chief justice and seven associates, was called upon to decide whether the act of Congress making the United States notes, commonly called "greenbacks," a legal tender was constitutional so far as it applied to contracts before its passage. The Court in 1869, by a vote of five to three, decided that it was unconstitutional.¹ By an act of Congress of April, 1869, General Grant having become President, the appointment of an additional justice was authorized. Judge Grier was one of the majority, and he resigned January 31, 1870, and soon after died. Judge Strong, who on the bench of the Supreme Court of Pennsylvania had decided in favor of the constitutionality of the legal tender act, was appointed by President Grant to fill the vacancy. Apparently the Court would now be equally divided upon the question. Judge Bradley was then appointed. At the time of the appointment of Judges Strong and Bradley there were two cases upon the Supreme Court docket involving the same question. Ordinarily, the decision in the prior case would afford the rule for the decision of these. But Judge Bradley had as counsel ably contended for the position that the legal tender acts were constitutional. These cases were argued,

¹ Hepburn *v.* Griswold, 8 Wallace, 603.

and, contrary to the former decision, the law was declared constitutional by the majority of the Court.¹

When Andrew Johnson was President, Congress passed an act over his veto providing that officers appointed by the President, by and with the advice and consent of the Senate, could only be removed by the like advice and consent. This was a congressional construction of the power of removal at variance with the practical construction which had obtained from the time of Washington's first administration. The President, claiming this act to be unconstitutional, removed Mr. Stanton, or went through the form of removing him, from the office of Secretary of War. For this act he was impeached by the House of Representatives, and upon trial escaped conviction by a single vote. Meantime Mr. Stanton continued to act as Secretary of War. It was probable that the validity of his acts as secretary would come before the Supreme Court, at the suit of parties affected by them, and thus his title to the office after the attempted removal become the subject of decision by the Court. To obviate any embarrassment from this source, Congress passed an act depriving the Court of jurisdiction.²

These instances will suffice to show that under the constitutional power of Congress over the organization and jurisdiction of the Supreme Court, the physical power exists in Congress to reduce the Court much below the high place it has occupied so long in the government.

It is possible, under the pressure of popular prejudice or exasperation, that this result may some time be accomplished; and regrets have been expressed that the organization and jurisdiction of the Court are exposed to congressional attack and diminution. The fact is reassuring, that more than a century of experience, often amidst the fiercest partisan strife, and bitter disappointment and denunciation, has only increased the public confidence. Some of the unsuccessful attempts to deprive it of its most useful jurisdiction will be recounted hereafter.

¹ *Knox v. Lee*, 12 Wallace, 457. The facts do not justify the charge that Judges Strong and Bradley were appointed to secure a reversal of the first decision, although their convictions as to the law were well known at the time of their appointment.

² *McCardle's case*, 7 Wallace, 506.

Fears also have been expressed that the Court may by construction so amplify its jurisdiction as to destroy the reserved rights of the states. The Court, however, is really the bulwark and defender of those rights, as its decisions upon the effect of the recent constitutional amendments attest. It will be presently shown that the Court has been more careful to preserve to the states their proper power to make and administer their own laws, than to give to these amendments the scope desired by their framers.

The business of the Court has kept pace with the growth of the country. In 1803 the whole number of cases on its docket was fifty-one. In 1819 there were one hundred and thirty-one. In 1860 there were three hundred and ten. In 1870, six hundred and thirty-six. In 1880, twelve hundred and two. In 1891, eighteen hundred. The cases were accumulating faster than the Court could dispose of them.

Congress in 1891 came to its relief by providing a circuit court of appeals in each of the nine circuits, with appellate jurisdiction to review the final decisions of the district and circuit courts in cases in which the jurisdiction is dependent entirely upon the different citizenship of the opposing parties, as an alien against a citizen, a citizen of one state against a citizen of another, and in cases arising under the patent, revenue, criminal, and admiralty laws. In such cases it made the decision of each court of appeals final, unless it should certify a question therein to the Supreme Court for its determination, or unless the Supreme Court should require such case to be certified to it.

The jurisdiction of the Supreme Court of the United States to review the final judgment of a state court in which the question presented is whether the state court has erroneously disposed of a federal question was not changed. It was given appellate jurisdiction of the judgments of the district and circuit courts of the United States in prize and capital cases, and in cases in which the constitutionality of any law of the United States, or the validity or construction of a treaty, is drawn in question, or the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

The theory of the new provision is to relieve the Supreme Court of cases involving state and not federal laws, and rights and obligations of persons dependent upon the laws of the Union, and to limit its labors to such cases as involve a doubt as to the true character of the sovereign powers and functions of the Union, their scope and limitations. The relief granted to the Court tends to exalt its position as the expounder and preserver of the Constitution.

The power of the Court, if necessary for the decision of the case before it, to declare a law either of the nation or of the state void, because unconstitutional, was new in our judicial history. It was a long time before the existence and effect of this new power came to be fully understood. It was perceived that the Constitution of the United States prohibited certain legislation, both to the states and to the United States, and that this prohibition bound the several legislatures. With respect to the states, it was also perceived that the Constitution of the United States, and the laws of the United States made in pursuance thereof, were the supreme law of the land, and that the judges in every *state* were bound thereby, notwithstanding the state constitution or law might contain provisions to the contrary (art. 4). But the lawyers and judges were not accustomed to the methods of reasoning which should, from these propositions, deduce the result that it would be necessary for the Court to declare the state law void when in conflict with the federal Constitution. And they were scarcely ready to admit the proposition that if the state court sustained the state law in preference to the Constitution of the United States, or in preference to statutes of the United States authorized by the Constitution, it was competent for the Supreme Court of the United States to reverse the judgment of the state court, and declare the state law void because in conflict with the federal Constitution.

Still less were they prepared to admit that the courts could declare a law of the United States void because not within the powers given by the Constitution to Congress. Our lawyers had been trained under the unwritten constitution of England, and knew that the power of Parliament was supreme in all

legislative matters. It is true there were certain fundamental rights and privileges of the subject, guaranteed by ancient charters of the king and the resolutions of Parliament, and reiterated by repeated judgments of the courts; upon these both lawyers and people reposed with entire confidence; but the power was not in terms denied to Parliament to invade them. Indeed, it would not comport with the Constitution of that kingdom to deny any law-making power to the legislative omnipotence of Parliament; and hence no court could set aside its laws. The universal sentiment that these rights and privileges were the birthright of the subject, and superior to the touch or invasion of power, generally sufficed to make them so. Perhaps no written constitution can add force to so universal a sentiment. Parliaments and courts recognize the fundamental principles which are everywhere respected, and everywhere self-operating. It is not improbable, therefore, that at the time of the adoption of the Constitution, few persons outside of the lawyers of the convention foresaw that there would be more need for the courts to correct violations of the fundamental law in this country than there was in England. But the conditions here were widely different. Our fathers desired to secure to the people every fundamental right which was the birthright of the Englishman, and also those which the American sense of equality and government by the people might require. There were many states with their domestic governments, and one nation with a national government for the better security of all. It was necessary that both governments should be adequate to their purposes; that national powers should be exercised by the nation, and domestic powers by the states, and that neither government should clash with the other. The people, who created both governments, reserved to themselves certain rights and privileges which neither government could diminish, and both must respect and protect. Over all the governments was the will of the people expressed by the Constitution, and all the governments were limited by this will thus expressed.

The judicial department was created to declare the law in actual cases of contest and dispute. What law should be declared? There were three kinds and sources of law: First,

the law or will of the people as embodied in the Constitution. Second, the law which Congress might enact. Third, the law which the states might enact. But the Constitution was the paramount law, while Congress had only such legislative power as the Constitution conferred. The states had such powers of domestic legislation as were reserved to them by the Constitution ; that is to say, all legislative powers conferred by their respective state constitutions, not denied by the federal Constitution or in conflict with it. This was an artificial arrangement, suggested by necessity and expediency, but very unlike the slow and natural growth of the English single system.

It was a compound of governments, coördinate and yet inter-dependent in functions ; each part theoretically defined and placed, but liable if unskillfully operated to clash with another.

The success of such a scheme required the existence of a supreme tribunal to ascertain and declare the actual law in cases and controversies between litigants, since it was probable that one government would, in enacting laws, encroach upon the jurisdiction of the other, and violate the fundamental law of the Constitution. Hence the Judiciary Department of the United States.

It is plain now that an act of Congress, or of the legislature of a state, which it has no power or authority to enact, is no law at all ; and it is equally plain that there must be some final and competent tribunal to ascertain and decide when an apparent law is no law ; otherwise doubt and conflict would result in anarchy. The vesting of such power in the Supreme Court of the United States does not constitute that Court the superior of the states or of the other departments of the government of the United States. The Court has no creative power ; it can make no law. The Court does not in case of an alleged conflict between the laws of Congress, or of a state and the national Constitution, attempt to make any new law or rule, but only to find out and declare what has always been the law and rule. It does not impose its own will as the law, but ascertains and declares whether the will of Congress, or of the state, as made in the form of a law, is in fact rightly so made ; or whether the constitutional limitations forbid it, or do not permit it.

An alleged law which there is no power to make must be void. An alleged law must be void which some body has the sole power to make other than the legislative body which assumes to make it. Any alleged law which a supreme power has prohibited must be void. An unfounded pretension to power cannot be rightful power. If the Constitution, and laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, then other laws to the contrary cannot also be supreme ; the supreme law must prevail ; the contrary law must be invalid. If the judges in every state are bound by the supreme law, “anything in the constitution or laws of any state to the contrary notwithstanding,” and yet do not by their judgments give effect to the supreme law, their error ought to be corrected upon appeal. If the Supreme Court has appellate jurisdiction of “all cases in law and equity” arising under the supreme law, the word *all* covers cases of the kind in the state courts as well as in the inferior federal courts.

These propositions seem simple to us, possibly because we regard them in the light of acquired and established methods of reasoning and construction. If the habit of reasoning or the authoritative construction had been the other way, it is not improbable that we should regard such propositions as ingenious fallacies, plausible but unsound.

It was difficult for the earlier lawyers and judges to yield assent to the doctrine that a law enacted by the legislative department, and approved by the executive department, could, because in conflict with the Constitution, be declared void by the judicial department. The proposition was a shock to their traditions and habits of thought. It is true that a few old cases could be found in the English reports, in which, as in Bonham’s case,¹ it is said : —

“ And it appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void ; for when an act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void.”

¹ 8 Coke, 118.

But the cases cited in illustration of this *dictum* show that the Court simply used common sense in construing an act of Parliament, and had no constitutional authority to declare it void; and that they held that Parliament could not be considered as intending by the letter of an act to do vain and impossible things, or to overthrow by implication rules of law and of right which by immemorial usage were regarded as of common right. They construed the act: construction may change the meaning of a law, but cannot destroy its validity. A rule of construction by which the courts ascertain the meaning of a statute ought not to be confounded with the constitutional power to declare it void. Nor did the lawyers suppose that there was any analogy between the two cases. An act of Parliament could not be challenged for want of the power of Parliament to make it: its construction and meaning when challenged were subjects for the decisions of the court; but the fact that the act needed interpretation implied the admission that the act was valid. The colonists had indeed contended that the Stamp Act and the acts of Parliament imposing internal taxation were void because against Magna Charta, but the English government, following the opinion of its great lawyers and judges, scouted the proposition.

The constitutional power of the courts to decide respecting the validity of legislative enactments was the consequence of constitutional limitations upon the legislative power. When, in 1776, the several colonies declared themselves free and independent states, and severally adopted written constitutions, they placed limitations upon governmental power. It soon became necessary for the courts to compare the actual exercise of power with the limited right to exercise it. Before the Constitutional Convention met in Philadelphia, in 1787, several cases had arisen in the states in which the point was presented that the legislative act was void, because in excess of legislative power as given by the Constitution, or in opposition to the Constitution itself.¹ The system of reporting was imperfect in those

¹ A collection of such cases can be found in an interesting article in the nineteenth volume of the American Law Review, p. 175. See also Carson's Supreme Court U. S., p. 120.

days, and these cases probably had not been generally brought to the attention of the profession. Mr. Gerry, however, in the Constitutional Convention, stated that state courts had already declared laws to be void because unconstitutional, and he said such would unquestionably be the duty of the federal judiciary. This view was generally concurred in by the delegates.

Oliver Ellsworth, a delegate from Connecticut, afterwards a member of the convention of his state which ratified the Constitution, later a member of Congress and author of the Judiciary Act of 1789, and still later Chief Justice of the Supreme Court of the United States, may be presumed to have been familiar with the views of the members of the federal convention, and with the object and scope of the judiciary article of the Constitution. In the Connecticut convention he said :—

“ This Constitution defines the extent of the powers of the general government. If the general government should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void ; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it void. On the other hand, if the states go beyond their limits, if they make a law which is an usurpation upon the general government, the law is void ; and upright, independent judges will declare it to be so.”

It is worthy of notice that Judge Ellsworth did not here say that the national judges would declare the unconstitutional state law to be void. He probably limited his meaning to “ the judges in every state,” who, by the sixth article of the Constitution, are declared to be bound by the supreme law of the Constitution. Whether the national judges should have power upon appeal to declare void a state law in violation of the Constitution was by the Constitution itself made to depend upon the act to be passed by Congress, regulating the appellate jurisdiction of the Supreme Court and prescribing the exceptions to the extent of its jurisdiction.¹

Mr. Hamilton, in the seventy-eighth number of “ The Fed-

¹ Art. 3, sec. 2, sub. 2.

eralist," is explicit in the assumption of the superiority of the Constitution over any hostile legislative act. He says : —

" There is no position which depends on clearer principles than that every act of delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal ; that the servant is above his master ; that the representatives of the people are superior to the people themselves ; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. . . . The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought to be preferred. In other words, the Constitution ought to be preferred to the statute ; the intention of the people to the intention of their agents."

Mr. Hamilton then proceeds to show that under a limited constitution the courts may properly be made the bulwarks of the Constitution against legislative encroachment.

Still this preliminary discussion but vaguely touched the constitutional power of the federal judiciary to declare a state law void because unconstitutional. That the courts ought to declare an unconstitutional law void was the proposition of the advanced thinkers and writers. But what courts ? This question Judge Ellsworth, in his draft of the judiciary act passed by the first Congress in 1789, attempted to settle. Respecting the decrees of state courts, the act provided : —

" A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under, any

state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined, and reversed or affirmed, in the Supreme Court upon a writ of error.”¹

The Supreme Court moved slowly, cautiously, and even hesitatingly, in the assertion of its novel powers. But cautious as it was, it soon brought upon itself the wrath of Congress and the people. In 1793, in *Chisholm v. The State of Georgia*,² the Court decided that a state could be sued by an individual citizen of another state. This decision was based upon the constitutional provision that the judicial power shall extend to controversies “between a state and citizens of another state.” This decision was contrary to the opinion which generally prevailed. Mr. Hamilton, in “The Federalist,” had said that the constitutional provision applied only to actions to be brought by a state, and not against it. State sovereignty took instant and alarmed offense, and demanded an amendment of the Constitution. Many of the states were heavily in debt, and were exposed by this decision to like suits. The state of Massachusetts was sued. Governor Hancock, as soon as the writ was served, convened the legislature, and that body resolved to take no notice of the suit.

The legislature of the state of Georgia passed an act subjecting to death, “without benefit of clergy,” any marshal of the United States, or other person, who should presume to serve any process against that state at the suit of an individual.

The Eleventh Amendment to the Constitution followed.

¹ “I opposed this bill from the beginning. It certainly is a vile law system calculated for expense, and with a design to draw by degrees all law business into the federal courts. The Constitution is meant to swallow all the state constitutions by degrees, and thus to swallow by degrees all the state judicaries.” (Maclay’s Journal.)

² 2 Dallas, 419.

This amendment is peculiar, and the Court might well consider its phraseology offensive. It does not undertake to alter any provision of the Constitution, but declares that —

“The judicial power shall *not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”

The amendment reversed the decision and doctrine of the Court. It gave and was intended to give the Court solemn warning that it had assaulted the sovereignty of a state, and had made a grave mistake. It might well be considered as an admonition to repress any tendency to enlarge the scope or meaning of the Constitution by liberality of interpretation. It affirmed the non-suability of a state, at least without its own consent.

This immunity of a state from suit by an individual proceeds upon the theory that a sovereign state is itself the fountain of justice, and that it will, from its own sense of honor, make ample provision for the examination and satisfaction of any claim upon its justice. To compel it to appear against its will in the court of another jurisdiction is an imputation of inferiority, and of a lack of justice and honor. This theory is a pleasant one, and is generally sound. But many states have not hesitated to repudiate their own bonds. The losses which have been visited upon delayed, scaled, and plundered investors in state bonds probably exceed one hundred millions. Numerous attempts have been made to correct this gross injustice. The Constitution permits one state to sue another in the Supreme Court of the United States. A few suits of the kind have been brought, mainly respecting conflicting claims to boundary lines. The provision is an admirable one. While it asserts the supremacy of the federal jurisdiction, it admits the equality of the suitors. The holders of state bonds have obtained permission of their state to assign their bonds to it, and then their state has sued the defaulting state. But these suits have failed; the Supreme Court properly holding that such a suit is an indirect attempt to defeat the constitutional immunity of a state from individual suit.¹ Suits against state officers have failed for the

¹ *New Hampshire v. Louisiana*, 108 U. S. 76.

like reason, when based upon a duty which the state refuses to perform.¹

The state cannot, by repudiating its contract, exempt its officers from suit, if they, in reliance upon such repudiation, seize the property of an individual to satisfy a tax or demand which he has satisfied according to the terms of the contract. The constitutional immunity from suit is a shield but not a sword.

Thus the law of the state of Virginia authorized its bond-holders to pay their taxes in the coupons of state bonds. The state subsequently changed the law so as to make such payment subject to new and restrictive conditions. A tax-payer tendered his coupons for payment of his tax in the manner provided in the original law. The collector, refusing to accept them, levied upon his goods. The Supreme Court held that he was a trespasser, that the state could not impair the obligation of its contract, that the collector had no unsatisfied tax to collect, that the fact that the state could not be sued did not exempt its wrong-doing officer from suit to repair the wrong he had done.²

Several suits were brought against officers of the state to prevent them from acting with respect to these coupons in the manner prescribed by the state law. These suits all failed, for the reason that they were indirect attempts to sue the state. The citizen was told that his constitutional right to the benefit of his contract with the state was his shield against aggression based upon the repudiation of that contract by the state, but the Constitution forbade him to use it as a sword to coerce the state. The distinction is narrow and sometimes results in injustice. But the temptation to extravagance and dishonesty, which the power to repudiate presents, lessens as the states advance in wealth and prosperity, and a higher sense of sovereign honor obtains.

¹ *Hagood v. Southern*, 117 U. S. 52.

² *Poindexter v. Greenhow*, 114 U. S. 270.

CHAPTER XIV.

THE INFLUENCE OF THE SUPREME COURT.—CONTINUED.

THE power of the Supreme Court to declare an act of Congress void because not authorized by the Constitution, or in conflict with it, was first presented in 1792, under the act of Congress for the relief of pensioners, already referred to; but no decision was made. The question might be said to be settled by the decision that Congress could not assign non-judicial duties to judicial officers.¹ It was again discussed in 1796.² Congress passed an act imposing a tax upon carriages. The Constitution³ provides that “direct taxes shall be apportioned among the several states according to their respective numbers.” There were more carriages in that day in Virginia, in proportion to the population, than in any other state, and hence if the tax was a direct one, Virginia would pay more than her share. The Court held that it was not a direct tax, but rather an impost or excise, which the Constitution directs shall be uniform throughout the United States. The law was thus sustained. Mr. Justice Samuel Chase, in the course of his opinion, makes the following remarks: “As I do not think the tax upon carriages is a direct tax, it is unnecessary for me at this time to determine whether this Court constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to and in violation of the Constitution; but if the Court have such power, I am free to declare that I will never exercise it, but in a very clear case.”

But at the same term the Court, in the case of *Ware v. Hylton*,⁴ decided that a statute of the state of Virginia, enacted

¹ Hayburn's case, 2 Dallas, 409.

² *Hylton v. United States*, 3 Dallas, 171. See *Pollock v. Farmers' Loan and Trust Co.* 158 U. S. 601.

³ Art. 1, sec. 2.

⁴ 3 Dallas, 199.

before the treaty of peace between the United States and Great Britain, was void, because the statute was contrary to the treaty, and the Constitution made the treaty the supreme law. The treaty therefore overruled the statute.

In the case of *Calder v. Bull*,¹ in 1798, the point to be decided was whether a statute of Connecticut was not an *ex post facto* law, and therefore void as forbidden by the federal Constitution. The Court held it was not an *ex post facto* law, and thus escaped holding it void. Mr. Justice Chase, in giving the opinion of the Court, used these words: "All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it."² Justice Chase then was, or afterwards became, an ardent and pronounced champion of the supreme powers of the general government. His arbitrary conduct and partisan speeches at the circuit courts in which he presided, and his rulings upon the trial of offenders against the odious sedition laws, so exasperated the Anti-Federalists that they procured his impeachment by Congress in the administration of President Jefferson. We may believe that his temperament was ill-suited for judicial fairness, but in ability he was more than a match for his accusers, and he easily escaped conviction when brought to trial.³ His *dictum* that no constructive powers can be exercised by the federal government is interesting evidence of contemporaneous opinion. It was soon repudiated by the Court, but remained the cardinal rule of constitutional construction of the Jeffersonian or democratic party, though not always adhered to in practice.

In the case of *Cooper v. Telfair*,⁴ decided in 1800, Judge Chase said: "It is indeed a general opinion, it is expressly

¹ 3 Dallas, 286.

² Compare Mr. Justice Strong, in *Knox v. Lee*, 12 Wallace, 534, in 1870: "It is not indispensable to the existence of any power claimed for the federal government, that it can be found specified in the words of the Constitution, and clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from one of the substantive powers expressly defined, or from them all combined."

³ John Randolph, upon the failure of the impeachment of Justice Chase, moved an amendment of the Constitution that "The Judges of the Supreme Court shall be removed by the President on the joint address of both houses of Congress."

⁴ 4 Dallas, 14.

admitted by all this bar, and some of the judges have individually in the circuits decided, that the Supreme Court can declare an act of Congress unconstitutional and therefore invalid, but there is no adjudication of the Supreme Court itself upon the point. Although it is alleged that all acts of the legislature (of a state) in direct opposition to the prohibitions of the Constitution would be void, yet it still remains a question where the power resides to declare it void."

It was not until 1803, fourteen years after the Constitution went into operation, that the Supreme Court explicitly announced the doctrine that a law of Congress repugnant to the Constitution is void. It was the case of *Marbury v. Madison*,¹ before referred to. The case was apparently insignificant, but the doctrines enunciated are so important and so lucidly expressed, and have been ever since so authoritative, as to justify a brief statement of it.

President Adams, just before the expiration of his term of office, had appointed Mr. Marbury justice of the peace for the District of Columbia, to hold office for five years. Justice Marbury's commission was duly made out during Mr. Adams's incumbency, but was not delivered, and it passed, upon President Adams's retirement, into the hands of Mr. Madison, President Jefferson's new Secretary of State. The reported case does not so recite, but in fact there was much gossip about the "midnight judges" whom President Adams appointed the last night of his term.² If we credit this gossip, there was not time to deliver this commission to Mr. Marbury after it was signed, and before the clock struck twelve, at midnight, March 3, 1801.³ Mr. Marshall was President Adams's Secretary of State, and continued for several weeks after his elevation to the chief justiceship to discharge

¹ 1 Cranch, 187.

² See note, ante, p. 291.

³ "I will expunge the effects of Mr. A.'s indecent conduct, in crowding nominations after he knew they were not for himself, till nine o'clock of the night, at twelve o'clock of which he was to go out of office." (Jefferson to Dr. Rush, March 24, 1801, Jefferson's Works, iv. 388.)

"The last day of his political power, the last hours, and even beyond the midnight, were employed in filling all offices, and especially permanent ones, with the bitterest Federalists." (Jefferson to Dr. Rush, January 16, 1811, Jefferson's Works, v. 561.)

the duties of the former office. He delivered this commission as a part of the unadministered assets of the office, to Mr. Madison. Mr. Madison refused to deliver to Mr. Marbury his commission, and Mr. Marbury made application to the Supreme Court for a mandamus to compel Secretary Madison to deliver it to him. The Court held that Mr. Marbury was entitled to his commission; that Mr. Madison had no right to withhold it; that a mandamus was a proper proceeding to compel its delivery; but after holding so much in favor of Mr. Marbury and against the administration, it then held that the Supreme Court had no power to issue the mandamus, and therefore could not give Mr. Marbury any aid. One would suppose that if the Court had no power to aid the claimant, its decision that his claim to the commission was a valid one would not be authoritative.¹ Be that as it may, the great point decided, and which the Court did have the right to decide, was that the Court could not grant the mandamus, because the act of Congress conferring the power upon the Court to issue it was not itself authorized by the Constitution, but was repugnant to it. The judiciary act authorized the Supreme Court to issue writs of mandamus "to any person holding office under authority of the United States." Secretary Madison was such a person. But the act of Congress was held to be unconstitutional, because the grant of the writ was the exercise of original jurisdiction. The Constitution defined the original jurisdiction of the Court, mentioned the cases in which it could be exercised, and provided that in all other cases the Court should have appellate jurisdiction; and that as the Constitution enumerated the cases in which the Court had original jurisdiction, the act of Congress conferring it in other cases was repugnant to the Constitution, and therefore void. Chief Justice Marshall announced the judgment of the Court upon this branch of the case, in an opinion remarkable for its clear and convincing exposition of the principles which rendered the Constitution the paramount law, and the absolute and self-executing nullifier of every at-

¹ "I observe that *Marbury v. Madison* has been cited [referring to the trial of Aaron Burr], and I think it material to stop at the threshold the citing of that case as authority and to have it denied to be law." (Jefferson to George Hay, June 2, 1807.)

tempted law repugnant to it. This opinion may be said to be equivalent to a part of the Constitution itself.

In some of the states, the decisions of their courts declaring a state law unconstitutional provoked the resentment of the people. A case arose in Rhode Island, in 1786. The state had chartered a bank and declared its bills legal tender, and imposed a heavy penalty to be inflicted by the judge without a jury trial, upon any person who should refuse to receive them. A butcher refused to take them in payment for his meat. He was prosecuted for the penalty, and the judges held the law unconstitutional, because the charter secured a jury trial which the law forbade. The judges were impeached, though not convicted; but the legislature refused to elect them again, and thus paper money won the victory.¹ In 1808, in Ohio, the judges declared a state law unconstitutional, and were impeached, but not convicted.² In 1822 an attempt was made in Kentucky, without success, to remove a judge who had declared a law unconstitutional.³ The people seemed to think that a judge who declared a law unconstitutional unjustifiably rated his power above that of the legislative and executive departments. But the truth is, the judge simply declares what the law is, and if the law of the legislature is in conflict with or repugnant to the Constitution, he must declare against the law of the legislature.

To return to the Supreme Court of the United States: in 1809 the Court decided that no state could pass a law to impair the effect of a judgment which a court of the United States had rendered.⁴ If the contrary doctrine had prevailed, an important step would have been taken towards stripping the nation of any effective power.

The state of Georgia passed a law in 1795, under which certain lands belonging to the state were sold to individuals. The passage of this law was procured by bribery and fraud, and a subsequent legislature repealed it and declared the conveyances given under it void. The Court held that the state, having, under the first law, made a contract with the purchaser

¹ Cooley's Const. Lim. 194.

² Cooley's Const. Lim. 194.

³ 23 Niles's Register, Sup. 153.

⁴ United States *v.* Peters, 5 Cranch, 115.

of the land, could not, by a subsequent law, destroy or impair that contract.¹ This was the case of the "Yazoo frauds." These frauds were famous for fifty years, and made and ruined the political fortunes of many a Georgia politician. The case in question afforded a striking illustration of the power of the nation, under the Constitution, — not, indeed, to compel a state to perform its contract, but to prevent it from rescinding and nullifying it, after it had been performed, to the prejudice of the persons who had dealt with the state. Thus, the injustice which the federal Constitution forbids a state to commit, the Supreme Court is competent to remedy.

The fact that the Constitution conferred the power and made it the duty of the Court, when the case came before it, to declare a law, either state or national, void, when in conflict with the federal Constitution gradually became familiar to the legal profession and to the people.

While this proposition met with general acceptance, the claim that the Supreme Court could, in the exercise of its appellate jurisdiction, review and reverse the decision of a state court, in cases in which the latter court held the state law not to be in conflict with the federal Constitution, or held the federal law or authority invalid, was vigorously challenged. The Supreme Court did exercise this power in a few instances, but when its full scope and consequences came to be perceived, the exercise of the jurisdiction was strenuously and bitterly resisted, not only at the bar, but by several of the state legislatures. The supremacy of the Constitution, and of the laws and treaties of the United States made in pursuance thereof, was admitted; but the contention was that the Constitution of the United States did not give to the Supreme Court appellate jurisdiction, except with respect to the cases which were decided in the "inferior courts" of the United States, and therefore did not extend to cases decided in the state courts.

The constitutionality of the section of the judiciary act, already cited, which provides that in the cases therein specified the final judgment of the state court might be reexamined, reversed, or affirmed in the Supreme Court of the United States, was

¹ *Fletcher v. Peck*, 6 Cranch, 87.

denied. Of course, whatever cases arise in the state courts must be decided there. If a party rests his claim or defense upon the laws, treaties, or authority of the United States, the state courts must decide whether his claim or defense is good or bad. If the claim or defense is good under the state law, but the opposing party alleges that the state law is void, because in conflict with the Constitution of the United States, the state court must decide that question. A plausible argument could be, and was made that the appellate jurisdiction of the Supreme Court of the United States is limited by the Constitution to the judgments of the inferior courts of the United States.

The Constitution provides for one Supreme Court, and for inferior courts of the United States. It then specifies the cases to which the judicial power of the United States shall extend, and makes the exercise of that power consist of both original and appellate jurisdiction: with respect to the Supreme Court it makes its original jurisdiction very small and its appellate jurisdiction very full. The inference was drawn that the inferior courts possess the original jurisdiction and the Supreme Court the appellate. That is, the inferior courts should hear and decide in the first instance the cases to which the judicial power of the United States extends, and an appeal would then lie from the decision of the inferior courts of the United States to the Supreme Court. This construction, it was contended, made the federal system complete and harmonious, and satisfied the terms of the Constitution. The words of the Constitution, providing that "the judicial power of the United States shall extend to *all* cases in law and equity arising under this Constitution," must mean only *all* those cases to which the judicial power of the United States extends, which the inferior courts of the United States decide; that if there had been any intention to extend the appellate jurisdiction to cases decided by the state courts, the Constitution would have contained an explicit declaration to that effect; but it simply bound the state judges to obey the Constitution as the supreme law. The intention to prostrate the state courts at the feet of the national courts could not be presumed; the obedience of the state judges was presumed. The position was further supported by argument

derived from the Tenth Amendment, that "The powers not delegated to the United States, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." The Constitution also requires "that full faith and credit shall be given in every state to the judicial proceedings of every other state, and Congress is required to prescribe by general laws the manner of proof and its effect."¹ The nature and purpose of the Constitution were considered: the United States, it was contended, is the servant or agent of the states in national concerns, not their master,—certainly not more than their equal. The state is a sovereign, and as such is equal in right with every power with which it has entered into a compact, or assumed any obligation, to judge concerning its full performance of its obligations, or the measure of its rights under the compact.

But the Supreme Court did not regard the argument sound. It said, if it limited the meaning of the clause, "all cases arising under the Constitution," to all such cases in the federal courts, and extended it to no other, its jurisdiction would not extend to all cases, but only to some of them. If every state court could give the final unappealable decision upon the constitutional questions coming before it, then the Constitution would have different force and meaning in the several states, and the equality of constitutional rights would be destroyed,—an evil which this provision of the Constitution could prevent, and must therefore have been devised to prevent.

This decision was made in a case brought before the Court upon appeal from the Court of Appeals of Virginia.² The state court at first refused to respect or enforce the decree of the Supreme Court, but subsequently receded. The objection was again urged in the case of *Cohens v. The State of Virginia*.³ In that case Cohens was convicted upon an indictment for selling lottery tickets. His answer was that he sold in Virginia lottery tickets authorized by Congress for a lottery to be drawn in the city of Washington. Cohens appealed to the

¹ Art. 4, sec. 1.

² *Martin v. Hunter's Lessee*, 1 Wheaton, 304.

³ 6 Wheaton, 264.

Supreme Court of the United States. The state of Virginia urged that the Court could not review the decision, because the state was a defendant and could not be sued. The Court held that the appeal was not a suit against the state, but a proceeding bringing the record of the state court into the Supreme Court in a case arising under the laws of the United States; that the Constitution did confer appellate jurisdiction upon the Supreme Court, since its appellate jurisdiction extends to all cases arising under such laws, no matter in what court decided.

The state of Pennsylvania in 1808 attempted to resist, by an act of its legislature, the execution of a judgment of the District Court of the United States, and when, notwithstanding this act, the Supreme Court of the United States by mandamus directed the District Court to execute its decree, the marshal of that court, who attempted to execute it, was for a time resisted by the armed militia of Pennsylvania, acting under the authority of the state. The state, after much irritating controversy, finally receded from its opposing attitude, and allowed the judgment of the court of the United States to be executed.¹ The case arose as follows: In the Revolutionary War Gideon Olmstead and others, citizens of Connecticut, were made prisoners by the British and put to service on the British sloop Active. On a voyage from Jamaica to New York the prisoners seized the vessel, confined the captain, and sailed for Egg Harbor. In sight of that port the Active was captured by an armed cruiser belonging to the state of Pennsylvania, brought into port, and was condemned by the admiralty court as a prize of the Pennsylvania captors. Olmstead and his associates claimed the prize as theirs, and they appealed to the Court of Appeals established for the purpose by the Congress of the confederacy, and this court awarded the prize to Olmstead and his associates, reversing the admiralty decree, and directing the marshal to sell the vessel and cargo and pay the proceeds to Olmstead and his associates. But the marshal under the direction of the admiralty court, although he sold the vessel and cargo, refused to pay the proceeds to Olmstead, but, in contempt of the order of the court of the confederacy, paid the proceeds to

¹ *United States v. Peters*, 5 Cranch, 115.

Judge Ross, the judge of the Court of Admiralty, and he paid the money to the treasurer of the state of Pennsylvania, taking from him a bond of indemnity. The state claimed the prize money. The treasurer's term of office expired, but he retained the money in order to make good the bond he had given the judge. The treasurer died, and Olmstead and his associates sued his executors in the United States District Court for the money and obtained judgment. But now the legislature of Pennsylvania passed an act to protect the executors in their disobedience of the decree of the District Court, and to employ force if necessary for the purpose. Judge Peters, the judge of the District Court, not wishing to embroil the United States with the state, refused to direct the execution of his own decree. Hence the application to the Supreme Court of the United States to compel its execution. The latter Court held that Olmstead was entitled to the money, because the Court of Appeals established by the confederate Congress had jurisdiction to reverse the original decree of the admiralty court, and because the state of Pennsylvania had no right to arrest the execution of the decree, or to decide that the court which pronounced it was without jurisdiction. "If," said Chief Justice Marshall, in delivering the opinion of the Court, "the legislatures of the several states may at will annul the judgments of the courts of the United States, and destroy the right acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." The final triumph of the United States was the occasion of intense chagrin on the part of the champions of state sovereignty, but they did not think it prudent to plunge the state into war with the United States.¹

¹ "Mr. Wirt, the Attorney-General, asked me to negotiate an arrangement with the state of Pennsylvania about a delinquent debtor both to the United States and the state of Pennsylvania. The United States marshal took his property in execution and the Pennsylvania sheriff took it from the marshal. The question was now, he said, before the Supreme Court, and he was afraid the decision would be in favor of the United States. Pennsylvania was indignant at being summoned before the Court, and refused to appear. He said if the decision should be in favor of the United States it would certainly stir up a dust, which I told him I could not help." (J. Q. Adams's Diary, iv. 83.)

South Carolina, in 1832, as we have already seen, attempted by her ordinance to nullify the tariff laws of the United States within that state. The ordinance provided that no appeal from a court of that state should be taken to a court of the United States in any case arising under laws passed in pursuance of the ordinance. Such appeal was denounced as a contempt of the state court, and the offender punishable. That difficulty was composed, and the ordinance in due time repealed.

In 1824 the state of Kentucky was greatly irritated over a decision of the Supreme Court with respect to a law of the state regulating titles which was held to violate the contract by which Virginia ceded the territory forming the state. The Court also held the laws of Kentucky, framed to stay the prompt and efficient collection of debts, to be void, because violating the obligation of the contract under which the debts were created.¹ The mutterings of rebellion were violent, and parties divided upon the question whether the state courts which respected the federal decision should be upheld or overthrown.²

The state of Ohio was exasperated because the Court held that the state had no right to tax the property held by the branches of the Bank of the United States within that state. These branches were held to be, like the bank itself, agencies of the government of the United States, and therefore not taxable by the state, since the power to tax might be exercised to destroy the agency. In defiance of the judgment of the United States Court, the state tax was collected by forcible seizure of the funds of one of these branches, but restitution was subsequently made.³

The exercise by the Supreme Court of jurisdiction to review and reverse upon appeal the judgments of state courts, in cases in which the supremacy of the Constitution of the United States was in question and denied, offended the champions of state sovereignty. A bill was introduced in Congress in 1831 to repeal the twenty-fifth section of the Judiciary Act of 1789,

¹ *Green v. Biddle*, 8 Wheaton, 1.

² Sumner's Jackson, p. 127.

³ *Osborn v. Bank of the United States*, 9 Wheaton, 738.

which defined and regulated the jurisdiction. The majority of the committee to whom the bill was referred reported in favor of the repeal, upon the ground that the jurisdiction was not conferred by the Constitution. A minority report was submitted supporting the jurisdiction. The bill was rejected by a vote of one hundred and thirty-eight against, to fifty-one in its favor. The lucid expositions of its jurisdiction by the Supreme Court, notably in the cases of *Martin v. Hunter's Lessee*,¹ and *Cohens v. Virginia*,² satisfied and convinced the majority in Congress. The establishment of the jurisdiction of the Supreme Court to review such judgments of the state courts as failed to give proper effect to the constitutional powers of the Union, or to the limitations upon state powers, either expressed in the Constitution, or implied by the grant of exclusive power to the Union, secured to it the full measure of its actual powers. The express restriction that no state shall pass any law impairing the obligation of contracts would have been shorn of its force but for this appellate jurisdiction. The restrictions upon state power, implied in the provision that Congress shall have power to regulate commerce with foreign nations and among the several states, would have been nullified by state action but for the same jurisdiction. These two provisions are of momentous importance. Both promote common honesty, and the latter is an immense factor in suppressing monopolies and securing equality in commercial and business rights. And however the states encroach upon the national power, or deny it, this appellate jurisdiction becomes the corrective.

One of the most important cases in the principles enunciated, and in the consequences resulting, that ever came before the Supreme Court is known as *McCulloch v. Maryland*.³ It involved the constitutionality of the charter of the Bank of the United States, and thus in a great degree the implied powers of Congress under the Constitution. It also involved the constitutionality of a state law imposing a tax upon the property held by a branch of the bank within the state of Maryland. Under the state law this property was taxed, and the bank refused to pay it, and the state sued its cashier.

¹ 1 Wheaton, 304.

² 6 Wheaton, 264.

³ 4 Wheaton, 316.

The state court upheld the state law and the tax, and gave judgment against the bank. The bank, it will be remembered, obtained its first charter from Congress in the first administration of Washington. It was one of the products of the brain of Hamilton, and one of the victories of the Federalists over their enemies. Certainly no express power could be found in the Constitution to justify its creation; the existence of any adequate implied power was denied with emphasis and confidence by the Anti-Federalists. The charter first granted expired in 1811. Congress then at first refused, by the casting vote of George Clinton the Vice-President, to renew it. Its affairs were wound up, and its stockholders received $109\frac{1}{2}$ per centum upon the dollar for the stock. Then local or state banks took its place. These suspended during the war of 1812, and great distress was occasioned by a depreciated paper currency. The Anti-Federalists were in power. The war and the bad currency of the local banks, and the need of the government to borrow money, gradually reconciled the Anti-Federalists to the project of another national bank. In 1816, five years after the first bank had discontinued its business, the necessity for financial relief, and the hope to find it by means of a new bank, led to its charter substantially upon the model of the original one. It had a capital of \$35,000,000, of which the United States held \$7,000,000. It had twenty-five branches in the different states. It was for that day a great institution. It had power and patronage which many enjoyed, and perhaps more felt that they might enjoy, if properly allotted. It is not surprising that the old bitterness and divisions which caused Hamilton and Jefferson to fall asunder in the cabinet of Washington should arise between the new generation of rival public men.

When the bank refused to pay the tax which the state imposed and appealed to the Constitution for its justification, the state retorted by claiming that the Constitution did not permit it to exist. Both questions now came to the test of judicial decision. William Pinkney and Daniel Webster were counsel for the bank. Pinkney, by common fame, was then the leader of the American bar. He made the principal argu-

ment upon his side. Chief Justice Marshall once said of him that "he was far away the greatest advocate he ever heard." He spoke to be heard rather than read. His argument upon that occasion was long after remembered, and regarded by those fortunate enough to hear it as unequaled for splendor and force.

Luther Martin, already mentioned as one of the delegates to the Constitutional Convention, and an eloquent opponent of the ratification of the instrument, led the array of counsel on behalf of the state.

The Court sustained the constitutionality of the charter of the bank, and declared the law of the state of Maryland taxing it unconstitutional, upon grounds stated in a previous chapter.¹

Respecting the power of the state to tax the property of the bank, the court held that the bank was created as one of the means to carry on the government; that the power to create implied the power to protect it; that if the state could tax it, it could so tax as to destroy it, and hence the state could destroy a governmental instrument of the United States,—a proposition not admissible; that the sovereignty of the state extended to everything which exists by its authority or permission; that the bank did not so exist, but existed by virtue of the creative power of the United States, and was therefore within the sovereignty of the United States, and without that of the state; and, finally, that the sovereignty of the United States was exclusive of that of the state, and not subject to any control or diminution on the part of the state.

These conclusions were reached by a range of discussion much broader than this synopsis suggests. The powers of Congress, as thus defined, were found to be broad enough to give it, unchecked by any restrictions on the part of the states, ample authority, within the sphere of its enumerated powers, to use whatever expedient means it should decide to be necessary for the purpose of executing its enumerated powers. In other words, while the government was one of limited powers, the powers it did hold it held supreme over the interference of the states, with all the means necessary and proper for their exercise and complete supremacy.

¹ See page 139.

Circumstances aided in giving to this case an importance and influence, with respect to questions involving the nature and origin of the government, not strictly necessary to the solution of the questions presented for decision. Counsel had deemed it important to discuss the question whether the Constitution emanated from the people, or whether it was a compact between sovereign and independent states. The Court said :—

“The convention which framed the Constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted; and by the convention, and by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject, by assembling in convention. It is true they assembled in states, but where else should they have assembled? . . . From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; it is ordained and established in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.’ The assent of the states in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance and could not be negatived by the state governments. The Constitution when thus adopted was of complete obligation and bound the state sovereignties. . . .

“It is said,” continued the Court, “that the people had already surrendered all their powers to the state sovereignties and had nothing more to give. But surely the question, whether they may resume and modify the powers granted to

government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, if it had been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, ‘in order to form a more perfect union,’ it was deemed necessary to change this alliance into a more effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people and of deriving its powers from them was felt and acknowledged by all. . . . The government of the Union, then, is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit.”

This opinion formed the basis of the great argument of Webster in his reply to Hayne, eleven years later; of the proclamation of President Jackson against nullification in South Carolina; and of the argument in defense of the indestructibility of the Union in the war of the rebellion in 1861.

The Constitution, said the Court, in *Texas v. White*,¹ requires the United States to guarantee to every state a republican form of government. Hence, when the rebellion broke out, Congress had the power to make all laws necessary and proper to carry that guarantee into effect, and to make the choice of means appropriate to the purpose.

It finally came to be regarded as unquestionable, not, however, without unavailing protests, that the Supreme Court was the final and proper arbiter in all questions of constitutional law, which, with the exception of the strictly political exercise of constitutional authority, could, under the Constitution and the judiciary act, be brought before the Court. Mr. Chief Justice Taney, in 1858, in the case of *Ableman v. Booth*,² already referred to, said:—

“No one can fail to see that, if such an arbiter had not been

¹ 7 Wallace, 700.

² 21 How. 506.

provided in our complicated system of government, internal tranquillity could not have been preserved, and if such controversies between the respective powers of the United States and of the states were left to the arbitrament of physical force, our governments, state and national, would soon cease to be governments of laws ; and revolutions by force of arms would take the place of courts of justice, and of judicial decisions. . . . Nor is there," he continues, " anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural or just pride of state sovereignty ; neither this government nor the powers of which we are speaking were forced upon the states. The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done for their own protection and safety against injustice from one another. . . . The importance which the framers of the Constitution attached to such a tribunal for the purpose of preserving internal tranquillity is strikingly manifest by the clause which gives the Court jurisdiction over the sovereign states, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another state by their sovereign powers, they have bound themselves to submit to the decision of this Court, and to abide by its judgment. And it is not out of place, here, to say that experience has demonstrated that this power was not unwisely surrendered by the states ; for, in the time that has already elapsed since this government came into existence, several irritating and angry controversies have taken place between adjoining states, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this Court to hear and decide them. . . .

"The Constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home ; for if this object could be attained, there would be but little danger from abroad."

It was feared by many when Chief Justice Taney succeeded Marshall, and the Court seemed about to be composed of the

appointees of Jackson and presidents of his school, that the constitutional expositions of Marshall would be repudiated, and a narrow line of construction adopted, which would deprive the nation of its ability to maintain its proper supremacy against the assaults of the states. Webster said he feared the Constitution would be destroyed by judicial construction. Judge Story, in 1845, expressed the same fear. But it was unfounded. The change which occurred during the twenty-eight years in which Taney sat in the seat of the Chief Justice did not result in any abandonment of the principles of construction which Marshall and his associates had enunciated. But the new cases, with their variety of circumstance, required a clear and fine discrimination in the application of those principles, and it was most admirably given. If we may judge from the increased number of dissenting opinions published, the Court was not so harmonious and united upon great constitutional questions as it had previously been. When a new question was presented involving the implied powers of the nation, or challenging the exercise of doubtful powers by the state, there was, perhaps, some shrinking back from the most advanced line of the national claim, and some pushing forward toward the most advanced line of the state claim, but the old landmarks were never abandoned.

Some members of the Court were advocates of a retrograde movement. In this respect Mr. Justice Daniel of Virginia, a member of the Court from 1841 to 1860, was conspicuous and consistent. During his nineteen years of service he wrote the opinion of the Court in only eighty-four cases. Of course he concurred with the Court in many more cases in which other members wrote the opinion. But he dissented in one hundred and eleven cases, either from the conclusion or the opinion of the Court. His dissent was generally based upon the theory that the Constitution must be literally and strictly construed. To use his words as reported in *Marshall v. B. & O. R. R. Co.* :—

“The Constitution itself is nothing more than an enumeration of general abstract rules, promulgled by the several states

¹ 16 How. 346.

for the guidance or control of their creature or agent, the federal government, which for their exclusive benefit they were about to call into being. Apart from these abstract rules, the federal government can have no functions and no existence."

He protested often and with emphasis against the doctrines of the majority, which he characterized either as additions to the Constitution or invasions of it. But he came too late into the Court to be able to lead it from its established principles.

The consequences resulting from the decisions of the Supreme Court, that the Constitution makes it the duty of the Court to declare an unconstitutional law, whether of Congress or of the state legislatures, void, when such declaration is necessary to the proper decision of the case before it, and that its appellate jurisdiction extends to all judgments of the state courts denying the supremacy of the federal Constitution over the state law, were most momentous.

Not immediately, but gradually, ultimately, and surely, the Court by its decisions separated the national and state powers from their confusing mixture, and gave to each clearness of outline and distinctness of place. It gave to the abstract words of the Constitution an active and commanding significance. It disclosed the instrumentalities by which rights conferred could be enjoyed, and wrongs forbidden could be averted or redressed. It composed conflicts, promoted harmony, and soothed passions. It defined the just limits of contending powers, separated encroaching jurisdictions, and restored each to its proper place. It lifted a dissolving and moribund nation to great strength and vitality. It gave to the states clear and accurate conceptions of their wide field of domestic government. It instructed coordinate departments. It vested the nation with its own, and did not impair the just powers of the states.

The peaceful manner in which all this was accomplished made the accomplishment more remarkable. Revolutionary results without revolutionary means are rarely witnessed in the history of mankind. Congress was restrained from passing laws in excess of its powers, not indeed by the command of the Court, but because at the suit of the humblest person in the land an unconstitutional law perished in the presence of the decree

which awarded justice to the suitor; partly also, because the wisdom and purity of the Court inspired a respect not less commanding than authority itself.

In like manner the attempts of the states to encroach upon the national jurisdiction were palsied by the decree of the Court, not between the nation and the state, but between the contending claimants over hostile personal interests. The opinion of the Court secured obedience. The questions involved were discussed and decided in the temperate atmosphere of the Court, and rarely attracted public attention. The public seldom pauses to listen to the quiet argument of counsel before the Court, however momentous it may be upon the decision it affects. Indeed, the principle of the decision itself may wait for generations before the governmental exigency arises which it proves apt and potent to control.

The Dred Scott decision was the most important of any brought before the Court while Chief Justice Taney presided. We have elsewhere spoken of this case. It was the judicial indorsement of the extreme pro-slavery construction of the Constitution. It helped to precipitate the rebellion, and indirectly led to the adoption of the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution.

The rebellion, in 1861, found the Court, upon its convening in December, composed of Chief Justice Taney of Maryland, and Justices Wayne of Georgia, Catron of Tennessee, Nelson of New York, Grier of Pennsylvania, and Clifford of Maine. There were three vacancies, one caused by the resignation of Justice Campbell of Louisiana, and two by the deaths of Justices Daniel and McLean. The Court as thus composed was not in sympathy with the political party which had placed Mr. Lincoln in the presidency. Justice Wayne, the senior member of the bench, had been appointed by President Jackson while Marshall was yet Chief Justice. Justice Catron was really the appointee of President Jackson. He received his appointment on the 4th day of March, 1837, the first day of Van Buren's presidency. Three of these venerable judges came from states which had seceded. But they were faithful to the Union, and to the Constitution.

In 1862 several cases were brought before the Court by the claimants of goods and vessels captured by the Union gunboats for violating the blockade instituted by President Lincoln. The cases illustrate the magnitude of the jurisdiction of the Supreme Court in our system, and also the right of the private citizen to appeal to it for redress for wrongs done him by the nation even in war.

The questions presented were the right of the government to establish a blockade of its own ports in a civil war, and the right of the President to institute such a blockade in the absence of any act of Congress declaring or recognizing a state of war.

The Court held that Congress alone had power to declare a national or foreign war; but that civil war breaks out without any declaration; it becomes a fact, and the President must recognize it. He is bound to take care that the laws be faithfully executed, and to suppress insurrection against the United States. He is bound to meet it in the shape in which it presents itself, without waiting for Congress to baptize it with a name. He must decide whether war exists, and his decision binds the people and the courts. He must decide whether a blockade is a proper exercise of force to suppress the insurrection and war, and when he decides that it is, he has the right to institute it. The opinion of the court was delivered by Justice Grier, and was concurred in by Justices Wayne, Swayne, Miller, and Davis. The three latter justices had been appointed by President Lincoln. Chief Justice Taney and Justices Catron, Nelson, and Clifford dissented. They were of opinion that without the previous declaration of war by Congress the President had no right to institute the blockade.¹

The case is a remarkable one. In the greatest of civil wars, while it is yet raging, while the very existence of the government is threatened by it, the judicial department, upon solemn and learned argument, deliberate upon, and decide by a bare majority of one, the question whether the initial steps taken for the suppression of the rebellion and war by the executive department in advance of any action by the legislative depart-

¹ Prize cases, 2 Black, 635.

ment, and while the latter, not being in session, can take no action, are lawfully taken.

The rebellion was fruitful of questions involving the war powers of the nation. The Court held that the authority to suppress rebellion was found in the constitutional provisions to carry on war and suppress insurrection; that power to reconstruct the governments of the seceding and subdued states was derived from the obligation of the United States to guarantee to every state a republican form of government;¹ that to put down the rebellion the United States had the powers of a sovereign and of a belligerent;² that rebels in arms might be treated as public enemies, their property confiscated, and the offenders punished;³ that the ordinances of secession passed by the seceding states were void;⁴ that the judgments of the confederate courts were void except so far as public policy and justice otherwise require;⁵ and that all acts done in aid of the rebellion were void.⁶

The Court also vindicated the supremacy of the civil over the military power, in the loyal states, during the existence of the rebellion. It held that military commissions organized during the civil war, in a state not invaded and not engaged in rebellion, in which the federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was not a resident of a rebellious state, or a prisoner of war, or in the military or naval service; that Congress could not invest military courts with such powers, but that the offender was entitled under the Constitution to a trial by jury, a right guaranteed as well in times of war as in peace; and that such a trial is only denied in cases arising in the land and naval forces, and in the militia, in time of war or public danger.⁷ The Court also held that a person who is a resident

¹ *Texas v. White*, 7 Wallace, 700.

² *Lamar v. Browne*, 92 U. S. 187.

³ *Miller v. United States*, 11 Wallace, 269.

⁴ *White v. Cannon*, 6 Wallace, 443.

⁵ *Stevens v. Griffith*, 111 U. S. 48.

⁶ *Dewing v. Perdicaries*, 96 U. S. 193.

⁷ *Ex parte Milligan*, 4 Wallace, 3.

of a loyal state, where he was arrested, who was never a resident of a rebellious state, nor connected with the military or naval forces, cannot be regarded as a prisoner of war.

Thus by one decision of the Court the safeguards of personal liberty, which it was feared the great war-powers of the nation had subverted or invaded, were reinstated in their original vigor.

Chief Justice Taney died in 1864, and was succeeded by Chief Justice Chase. The majority of the Court was now composed of the appointees of President Lincoln. If any change could be noticed in the tone of the Court, it was in the recognition and deference paid to the judgments which had been announced by Chief Justice Marshall.

Time has, indeed, exalted the fame of the great Chief Justice. We can see now that if, during the thirty-five years in which he presided, the rule of the narrow constructionists had prevailed, the Constitution would, like the Articles of Confederation, have proved altogether too weak and impotent a governmental system for the great nation.

Chief Justice Marshall, in the face of the opposing construction of the parties which held power in the executive and legislative departments of the nation, rose to the height of the contemporary and future demands of the government, and expounded the Constitution with the wisdom of the sage and the prescience of the seer. When the rebellion broke out, his judgments proved authoritative for the maintenance of the integrity of the Union, its inherent existence as one nation, and its right to seize and wield its arms to subdue the revolt of the seceding states. It was in 1883, at the Capitol in Washington, forty-nine years after his death, that the national Congress and the representatives of the national bar assembled together and unveiled with becoming ceremonies the bronze statue of John Marshall. Time had made the more conspicuous his merits. The keenest powers of legal criticism and analysis, focused upon his opinions for forty-nine years, had shown with what breadth and strength he had placed the nation upon the Constitution. He found in the Constitution an enumeration of powers barren of definition, but coupled with ample means. To

many minds this implied poverty of power, and a consequent restriction of means. But to the mind of the Chief Justice the absence of all definition opened the whole field of admissible definition, and in like manner the whole field of proper means. The rebellion was, in some degree, an appeal from the judgments of Marshall to the arbitrament of war. Then it was more fully disclosed how luminous he had made the dark places in our constitutional charter of powers. In the light of his expositions the nation found authority to protect itself.

It may be that monuments of brass and marble, as well as the robes sometimes worn by the priest and judge, are remnants of those objective displays by which power and pretension awed and subdued barbarians, and are therefore unfit to commemorate intellectual and moral worth. Be this as it may, the recorded opinions of Marshall are his real monument. Bronze and marble may assert that he was great, but his opinions attest it.

It is interesting to notice with what vigor and directness Marshall's doctrine was enunciated by the Court after the rebellion had been subdued. Thus, in 1870, in *Knox v. Lee*,¹ Mr. Justice Bradley said: —

“The doctrine so long contended for, that the federal Union was a mere compact of states, and that the states, if they chose, might annul or disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the general government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has finally been effected by the national power, as it had often been before by overwhelming argument. . . . The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality; it is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike,

¹ 12 Wallace, 555.

and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, public lands, and interstate commerce: all which subjects are expressly or impliedly prohibited to the state governments. It has power to suppress insurrections, to repel invasions, to organize, arm, discipline into the service, the militia of the whole country. The President is charged with the duty, and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the states, and between their respective citizens, as well as questions of national concern ; and the government is clothed with power to guarantee to every state a republican form of government, and to protect each of them against invasion and domestic violence. For the purpose of carrying into effect these and other powers conferred, and of providing for the common defense and general welfare, Congress is further invested with the taxing power in all its forms, except that of laying duties upon exports, with the power to borrow money on the national credit, to punish crimes against the laws of the United States and of nations, to constitute courts, and to make all laws necessary and proper for carrying into execution the various powers vested in the government or any department or officer thereof."

In 1883 Mr. Justice Miller said :¹ —

"The proposition that the general government has not the power to protect the elections upon which its existence depends from violence and force is supported by the old argument, often heard, often repeated, and in this Court never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly granted it. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments in writing, that what is implied is as much a part of the instrument as what is expressed. This principle in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all deriva-

¹ *Ex parte Yarbrough*, 110 U. S. 658.

tive powers, a difficulty which the instrument itself recognizes, by conferring upon Congress the authority to pass all laws necessary and proper for carrying into execution the powers expressly granted, and all other powers vested in the government or any branch of it by the Constitution."

In *Texas v. White*,¹ Chief Justice Chase, after referring to the Articles of Confederation, by which the Union was declared to "be perpetual," and then to the Constitution, ordained "to form a more perfect union," said : —

"What can be indissoluble, if a perpetual union made more perfect is not? . . . The people of each state compose a state, having its own government and endowed with all the functions essential to separate and independent existence, and without the states in union there could be no such political body as the United States. The preservation of the states and the maintenance of their governments are as much within the care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible states."

¹ 7 Wallace, 725.

CHAPTER XV.

THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS, AS CONSTRUED BY THE SUPREME COURT.

THE Thirteenth, Fourteenth, and Fifteenth amendments mark a new era in our constitutional history. They did not grant universal manhood suffrage, but they led to it. They did constitute the deed of gift, by the United States, of freedom and citizenship to the slave and to the native and naturalized negro, and hence, potentially, of every civil right, privilege, and immunity which freedom and citizenship can confer upon the negro race. This was their primary object. But their scope was wider; and its full extent has not been yet ascertained. The possible scope and effect of these amendments upon all the people of the United States, and upon the power of the nation, to exercise, control, and abridge the powers of the states in the making of the laws which affect the personal rights of all the people, made these amendments a critical turning-point in our constitutional history. Both the nation and the states stood at the dividing of ways. Which way would be taken depended upon the construction which the Supreme Court should give to these amendments. No more solemn or momentous responsibility had devolved upon the Court since the foundation of the government. Passing by the question of the liberty, citizenship, and civil rights of the negro race, with respect to which the purpose and effect of the amendments were supposed to be clear, the first section of the Fourteenth Amendment presented questions, not only fairly debatable, but of a consequence and gravity scarcely possible to overestimate.

This section provides:—

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section provides : —

"The Congress shall have power to enforce by appropriate legislation the provisions of this article."

The extent and definition of citizenship of the United States had been a vexed question, greatly discussed but not settled in the Dred Scott case. Did this amendment put all these questions aside and make citizenship of the United States the primary and greater citizenship, including all the less,—such as citizenship of a territory or the District of Columbia,—and make it sufficient of itself to be the source, support, and protection of all the civil rights of the freeman ? Would these civil rights be and remain the privileges and immunities of the citizen of the United States, and, because of the greater citizenship of the nation, be above the reach of any part of the whole ? Were the life, liberty, and property of every person thus brought within the supreme protection of the supreme power, and hence made inviolable except by due process of law, to be prescribed by the appropriate legislation of Congress ? and hence were the states commanded not to deprive any person of this gift of the supreme power, except by such process of law as Congress should prescribe ? Was Congress authorized to provide by appropriate legislation for the equal protection of every person, and for such purpose to enact laws which should be paramount in every jurisdiction ? and therefore was it that the states were forbidden to deny to any person within their respective jurisdictions such protection ? Were there to be a major and a minor jurisdiction, and should the minor deny no right, privilege, immunity, protection, form, or process of law which the major jurisdiction should establish ? And if so, should the nation make every person secure against such denial by the state, by "appropriate legislation" prescribing the laws, touching all these matters, which laws the state, and upon its default, the nation, should execute every-

where? Would it not be appropriate legislation to supersede every state law respecting every one of these matters, define by a national code their nature and extent, and prescribe for their protection, regulation, and enjoyment? Let these questions be answered in the affirmative, and the states would cease to be sovereignties, and would become mere territorial or geographical divisions of the nation.

And it was easy to answer them in the affirmative. The Supreme Court had held with respect to the surrender of the fugitive slave that the constitutional provision that no law of any state into which the slave might escape could discharge him from slavery, but that he should be delivered up, was not only a veto of such state law, but an enabling power in Congress to make the necessary laws to give complete effect to the master's right to reclaim his slave. Mr. Justice Harlan, in his dissenting opinion in the Civil Rights cases,¹ said:—

“I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship what it did, with the sanction of this Court, for the protection of slavery and the rights of the masters of fugitive slaves.”

Mr. Justice Swayne, in the like opinion in the Slaughter-House cases,² said:—

“These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. Before the war ample protection was given against oppression by the Union, but little was given against wrong and oppression by the states. That want was intended to be supplied by this amendment.”

In the exposition of these amendments the Supreme Court has in a great degree disappointed the expectation of their framers. Certainly the Court has not risen to the summit level of the revolutionary reformers. It has refused to give

¹ 109 U. S. 26, 53.

² 16 Wallace, 128.

them that construction which would draw to Congress full power of affirmative legislation over all the important matters embraced within them. It has discriminated sharply and narrowly between the civil rights, privileges, and immunities which are the gift of the United States to a citizen or person, and those which belong to him by universal and common law in his capacity as a freeman. It has held that Congress has the right by appropriate and affirmative legislation to protect and to confide the protection to the jurisdiction of the federal courts of all the rights, privileges, and immunities which are given by the Constitution of the United States. But it also has held that while the Constitution gives to the negro liberty and citizenship and equal civil rights, and Congress may therefore affirmatively take jurisdiction of them, it does not give them to the white man; he had them before the Constitution was made, and they therefore are not its gift, and therefore the Fourteenth Amendment no further affects them than to prevent a state, not the citizens of a state, from denying or abridging them; and to give to the federal courts power to correct upon appeal any affirmative denial of due process of law and the equal protection of the laws.

The importance of the decisions of the Court will justify a reference to some of them.

The first important decision was made in the Slaughter-House cases.¹ An act of the state of Louisiana conferred upon certain slaughter-house companies in the city of New Orleans the exclusive privilege of carrying on the business of slaughtering animals, and of receiving and storing the animals for that purpose. Certain butchers brought or defended actions upon the ground that their privileges and immunities as citizens of the United States were thus abridged by the state, and that they were denied by the state the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment.

The state court upheld the state law, and the Supreme Court of the United States affirmed the decision. The Supreme Court held that the provision that "no state shall make or enforce any law which shall abridge the privileges and immunities of cit-

¹ 16 Wallace, 36.

izens of the United States" does not vest in the United States the power to deny to the state the right to make and enforce a law to abridge the privileges of a citizen of a state as distinguished from the privileges of a citizen of the United States. That it only secures the citizen of the United States from infringement by the state of such privileges and immunities as he derives from his citizenship of the United States, or under its Constitution and laws, and that the privileges and immunities secured to a citizen of the state by virtue of his state citizenship he must rely upon his state to protect.

It was first shown that the state of Louisiana had by virtue of its police power the right to pass the act unless restrained by the federal Constitution. The Court then proceeded to show that the privilege to slaughter cattle on one's own premises, and the right to an immunity from a monopoly of the business in others, if any such rights exist, are rights incident to state and not to national citizenship, and since the constitutional inhibition is against a state infringement of the privileges and immunities of citizens of the United States, the constitutional provision does not apply.

In elucidation of this position the Court assumed that the primary object of the Thirteenth, Fourteenth, and Fifteenth amendments was to reverse the previous national position with respect to slavery and to the negro race, and to give to the negro and his race freedom and equality of rights with the white man without discrimination. The Thirteenth Amendment abolished slavery and its incidents and had no other purpose. The Fourteenth Amendment first provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside." The purpose of this provision was to put an end to the rule asserted in the Dred Scott case, that a man of African descent, whether slave or not, was not and could not be a citizen of a state or of the United States. The minority opinion in that case had asserted that no man could be a citizen of the United States except through his citizenship of a state. This new constitutional provision puts aside both of these contentions, and declares *all* persons born in the United

States and subject to its jurisdiction to be citizens of the United States, whether they reside in a state, territory, or other possession thereof. It also gives them the added citizenship of the state in which they reside. Hence there now exist two kinds of citizenship, one state, the other national. The Court then proceeded to show that the citizenship provision of the Fourteenth Amendment takes nothing from the civil rights of state citizens as they have always existed ; and examining those rights as they existed at the time of the separation of the states from Great Britain, and under the Articles of Confederation, and under the Constitution previous to the Fourteenth Amendment, and as they had been declared by the repeated judgments of the courts, held that the civil rights of a citizen of a state embrace all those rights which are fundamental in their character, and belong to the citizens of all free governments, and include nearly every civil right which belongs to the freeman by virtue of his manhood and freedom, for the establishment and protection of which governments are of right instituted among men. Further, that the new constitutional provision does not subvert in this respect the ancient sources of civil rights, nor transfer their derivation and security from the state to the nation. The Constitution has always contained the provision, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states ;" but this does not create any privilege and immunity ; it simply declares that the citizen of one state, when he leaves it and goes into another, shall have in the latter state all the privileges and immunities which such state gives to its own citizens. It does not in any way control the action of any state in giving to or withholding privileges and immunities from its own citizens. All these privileges, whatever they are, lie outside of the scope or power of the federal government, except in the few special instances in which power is by the Constitution denied to a state, such as the prohibitions against *ex post facto* laws, bills of attainder, and a few others.

If the recent amendment did transfer the source and protection of all these civil rights — the inherent attributes of state citizenship — from the state to the nation, then Congress by its

legislation could draw to itself a wide and illimitable jurisdiction over all the privileges and immunities of the citizens of the states, and fetter and degrade the states to a degree nearly approximating their governmental annihilation. No such purpose could be imputed to the Congress which proposed, or to the states which ratified, the amendments.

In response to the claim that the act in question violated the further provision of the amendment, "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws," the Court said the evil to be remedied by this clause grew out of the existence of laws in some of the states discriminating with gross injustice and hardship against the negroes as a class. If the states should fail to remove these discriminations, Congress could enforce the provision by appropriate legislation. The Court added: "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."¹

The opinion closed with a strong assertion of the duty of the Court to uphold the state governments. The Court remarked: —

"We do not see in these amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government including the regulation of civil rights — the rights of persons and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations upon the states, and to confer additional power on that of the nation."

The prevailing opinion was prepared by Mr. Justice Miller. Chief Justice Chase and three of the associate judges dissented.

Mr. Justice Field prepared the dissenting opinion. In it he attacked the foundation of the prevailing opinion, namely, that the Fourteenth Amendment did not vest in the national government the source of citizenship, and the civil rights attaching to

¹ See *Williams v. Mississippi*, 170 U. S. 213.

it. He referred to the conflicting opinions which had previously prevailed respecting the source of citizenship, and the persons entitled to it, and then said : —

“ The first clause of the Fourteenth Amendment changes this whole subject and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth or the fact of their adoption, and not upon the constitution or laws of any state, or the condition of their ancestry. A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. . . . They do not derive their existence from its legislation and cannot be destroyed by its power.”

This being true, it followed that no state could abridge or deny to any citizen of the United States any privilege or immunity which he enjoys by virtue of his being born or naturalized in the United States and subject to its jurisdiction.

It is obvious that the difference between the positions taken by the majority and the minority of the Court is fundamental. Under the opinion of the majority the amendments fail in one of the most important objects intended to be accomplished by their framers, namely, the subversion of the basis upon which the most extreme positions and claims of state rights rest. If all the civil rights of the citizen should find their parent and protector in the nation instead of the state, the state would have small standing-room in which to develop or nurture legal antagonism to the nation.

Two years later Mrs. Minor's case¹ was decided by the Court. Mrs. Minor sued the registrar of voters in the election district in Missouri where she resided, because he refused to place her name upon the list of persons entitled to vote at the general election for presidential electors and other officers. She was born in the United States, was subject to its jurisdiction, and was qualified to vote, unless her sex was a disqualification.

¹ *Minor v. Happersett*, 21 Wallace, 162.

The Constitution of Missouri limited the right to vote to male citizens. Her argument was that she was a citizen of the United States, that the right to vote was one of the privileges of citizens of the United States, having the proper state residence ; that under the Fourteenth Amendment no state could abridge her privilege ; that the Constitution of the United States did not abridge or deny it, and therefore her right to vote was constitutionally perfect.

The Court, Chief Justice Waite delivering its unanimous opinion, held that Mrs. Minor was a citizen of the United States ; that the Fourteenth Amendment was not necessary to make her a citizen ; that as one of "the people" of the United States, born of citizen parents under its jurisdiction, she became a citizen ; that before the amendment the right to vote was not necessarily one of the privileges or immunities of citizens ; that the amendment added nothing to these privileges and immunities, it simply added the national guarantee of protection to such as the citizen already had. The Constitution does not define the privileges and immunities of citizens. That definition must be sought elsewhere. The Court would not attempt to define them, but held that suffrage was not one of them. The United States does not qualify voters, but the states do. Voters existed in the several states before the Constitution was framed. The states continue to prescribe their qualifications. The right to vote is usually conferred upon men, but not upon all men. Women are generally excluded.

In 1875 Cruikshank's case¹ came before the Court. Cruikshank had been indicted and convicted, with others, in the Circuit Court of the United States, for conspiring to deprive certain negroes of their right as citizens to vote, and of their right to enjoy certain other privileges alleged to be secured to them by the Constitution and laws of the United States. The indictment was loosely framed, and was held to be insufficient to sustain any conviction. But the Court, in its opinion, held that the right to vote was a right derived from the state, and conferred by it upon its citizens, and was not held by virtue of citizenship of the United States ; and hence a conspiracy to

¹ 92 U. S. 542.

deprive a citizen of that right was a violation of state privileges, not those of the United States, and hence no case was presented for federal jurisdiction or interference. If, however, the Court suggested, the defendants had been charged with a conspiracy to deprive the parties of their right to vote on account of their race or color, then the charge would have been one of which the United States has jurisdiction, since the right to exemption from discrimination in the right of suffrage on such account comes from the United States.

No rights, the Court held, can be acquired under the government of the United States except such as it has authority to grant or secure ; all other rights are left to the protection of the states. The indictment, among other things, charged the defendants with the intent in their conspiracy to deprive the negroes named "of their lawful right and privilege to assemble peaceably together for a peaceful and lawful purpose."

Such a right, the Court held, antedated the Constitution. It is found wherever civilization exists, and is therefore not conferred by the Constitution. As a universal right, Congress was by the Constitution enjoined from abridging it. The people must look for their protection in its enjoyment to the states. The same was said of the right "to bear arms for a lawful purpose," and of "the rights of life and personal liberty." The Fourteenth Amendment, by prohibiting a state from depriving any person of life, liberty, or property, without due process of law, adds nothing to the rights of one citizen against another. It simply adds a guarantee against any encroachment by the states upon these rights. The encroachment by citizens is not an encroachment by the state. The same is true of the provision prohibiting a state from denying "to any person within its jurisdiction the equal protection of the laws." Equality of rights is a principle of republicanism. The duty to protect the citizen in this respect was originally assumed by the states, and still remains there.

It seemed to many of the friends of the Fourteenth Amendment, in the light of these decisions, that the amendment, instead of being destructive of the states' control over the privileges and immunities of the citizen, proved to be the instru-

mentality by which state rights were reëstablished, and that the power in the states and the lack of power in the United States were rendered clearer than ever before.¹

In Reese's case² the Court held that rights and immunities created by the Constitution of the United States, or dependent upon it, can be protected by "appropriate legislation" on the part of Congress. Thus the Fifteenth Amendment, although it does not confer the right of suffrage, does confer exemption from discrimination in the exercise of it on account of race, color, or previous condition of servitude. If Congress should confine its legislation to measures to prevent such discrimination, it would be appropriate legislation, but as in the case under consideration such legislation was not so confined, it was inappropriate, and therefore void.

In 1879 several cases came before the Court involving the Fourteenth Amendment.³ In Strauder's case a negro was indicted, tried, and convicted for murder in the state court of West Virginia. By the law of that state jurors could only be selected from white male citizens. Because of this exclusion of colored citizens from the jury, the defendant, in proper form before trial, asked to have his case removed from the state court to the Circuit Court of the United States, pursuant to an act of Congress providing for such removal. His request was denied by the state court. The Supreme Court held that it ought to have been granted, because the state had by its jury law discriminated against the equal right of colored men to serve upon juries, and therefore against the right of the defendant to have his jury selected without discrimination against him or them on account of race or color. The Fourteenth Amendment was intended to secure the colored man against such discrimination, and the act of Congress providing for the removal of the cause was intended to afford the means, and to point out the method, of obtaining such security.

In Rives' case two colored men were indicted for murder in the state court of Virginia. The jury law of that state does

¹ See remarks of Mr. Shellabarger, one of the framers of the amendment, 126 U. S., at page 600.

² 92 U. S. 214.

³ 100 U. S. 303-422.

not discriminate against colored citizens. Nevertheless only white men were placed on the jury list for the court in which the defendants were to be tried. They asked that a jury be selected, one third of which should be colored men. The motion was denied. The Supreme Court of the United States held that as the law did not discriminate against them, they had not presented any just ground for the interposition of the Court.

In *Ex parte Virginia* the county judge of a county in that state was charged by law with the duty of selecting jurors for the state court held in that county. He was indicted in the United States Circuit Court for a violation of the jury law, in that he had excluded from the jury citizens of color, although they were possessed of all the qualifications required by law; that such exclusion was made by him because of their race, color, and previous condition of servitude.

Having been arrested upon the indictment, he applied to the Supreme Court of the United States for a writ of *habeas corpus*, in order to be discharged from custody. The state of Virginia united in his application, alleging that she was unlawfully deprived of the services of one of her officers.

Congress had passed an act providing that if any officer charged with the duty of selecting jurors should exclude any person from such service upon account of his race, color, or previous condition of servitude, he should be guilty of a misdemeanor. The Court held that the act of the county judge was the act of the state, and therefore the restriction imposed by the Fourteenth Amendment against the denial by the state to any person of the equal protection of the laws was violated by the act of the county judge.

In 1875 Congress passed an act providing that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the privileges of inns, public conveyances, and places of public amusement, subject only to such conditions as should apply alike to persons of every race and color, and providing for the punishment of violations of the law.

The Supreme Court of the United States in the Civil Rights cases¹ held this act to be unconstitutional; that the denial of

¹ 109 U. S. 3.

equal accommodations and privileges in inns, public conveyances, and places of amusement is no badge of slavery or involuntary servitude, and therefore is not within the meaning of the Thirteenth Amendment. That the Fourteenth Amendment is prohibitory upon the states and not upon individuals, and that the power of Congress to enforce the amendment by appropriate legislation does not extend to legislation prescribing the rights of the parties themselves between each other, but only to the correction and prohibition of legislation and action on the part of the state, abridging or denying the equal protection of such laws as the state may make for any of its people. The state had made no law denying to colored men equal accommodations and privileges with white men in inns, public conveyances, or places of amusement, and therefore the state had not done these negroes wrong; it had not denied them equal protection of the laws. The right to equal accommodations and privileges in these places is not any privilege or immunity given by the Constitution to citizens of the United States, and therefore is not within the power of the United States to enforce by "appropriate legislation." If the state should assume to make a law denying the black man any privileges allowed to the white man, it would be appropriate legislation for Congress to override, nullify, or vacate such a discriminating law. If the state courts should enforce state laws which denied equal protection to any person, then the Supreme Court by the exercise of its appellate jurisdiction might correct the error.

Yarbrough's case¹ and Waddell's case² point out the distinction between the power of Congress to legislate respecting the general and fundamental rights of the citizen or individual and those rights which have their exclusive origin under the Constitution or laws of the United States. In the one case Congress may only correct or nullify the wrongful law or action of the state, in the other it may pass the laws needful to protect the right.

In Spier's case, in 1887,³ a question of the utmost importance was presented to the Court, which, however, it did not find it necessary to decide. It was contended in argument that

¹ 110 U. S. 651.

² 112 U. S. 76.

³ 123 U. S. 131.

the first ten amendments of the Constitution do confer privileges and immunities upon citizens of the United States, and therefore no state can abridge any of them ; that although these ten amendments were originally only restraints upon the federal power, yet inasmuch as they declare and recognize rights of persons, these rights are theirs as citizens of the United States, and now are made secure by the Fourteenth Amendment against any denial or abridgment by the states. The first ten amendments, it was contended, confer privileges and immunities upon the people and citizens of the United States. They are in the form of a Bill of Rights as expressed in *Magna Charta*, and ever since, and imply the grant of the privileges and immunities the invasion of which the amendments prohibit. When the first ten amendments were adopted, these privileges and immunities were regarded as derived from the states, and the nation was prohibited from invading them ; but when it was afterwards found that the states did invade them, the Fourteenth Amendment recognized them as privileges and immunities of citizens of the United States, and thus directly placed them within the national protection.¹ Thus, the right to be secure in their persons, houses, papers, and effects against unreasonable search and seizure ; the immunity from the quartering of soldiers in their houses, from self-accusation, from trial for crime without indictment, from a second trial for the same offense, from excessive bail and fines, from cruel and unusual punishments, from taking of private property for public use without just compensation, are found in these amendments. True, these provisions are also inserted in most of the state constitutions, but if they are national securities to the national citizen, the federal court must, it was urged, review the judgment of the state court denying the protection of any one of the provisions.

The court reiterated the doctrine that the first ten amendments were not intended to limit the powers of the states in respect of their own people, but restricted the national powers. It declined deciding whether the Fourteenth Amendment transformed such restriction of national powers into a grant as the attributes of national citizenship of the privileges and immuni-

¹ See *O'Neil v. Vermont*, 144 U. S. 361, 370.

ties forbidden to be restricted, holding that the facts in the case did not present the question. The court, however, assumed that with the exception of the right to petition the government of the United States, a right which could not exist independently of the existence of such government, no privilege or immunity mentioned in the ten amendments is derived from the United States, and therefore the Fourteenth Amendment does not transform them into grants of privileges and immunities of citizenship of the United States, and does not withdraw them from state regulation and control.¹

The great value of the Fourteenth Amendment to the white race springs from its prohibition upon the states to deny due process of law or the equal protection of the laws to any person.

This provision is narrowly and technically construed, but probably broadly enough to prevent all flagrant violations of its spirit by any state.²

The Court holds that there are privileges and immunities of the United States, not springing from citizenship, but from the duty of the United States to protect every person rightfully engaged in its service, or lawfully enjoying its grants, or in the pursuit of them, or exercising any franchise derived from the United States.³

If a state by its law deprives "any person of life, liberty, or property without due process of law," the wrong can be corrected by the Supreme Court of the United States, upon appeal from the judgment of the state court enforcing the state law. "Due process of law" is not defined in the Constitution. It means the same as "law of the land" in *Magna Charta*. This process in the states is regulated by the laws of the state.⁴ But

¹ *Moore v. Missouri*, 159 U. S. 673; *Thorington v. Montgomery*, 147 U. S. 490. "When any of these rights and privileges are secured in the Constitution only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution, but that the Constitution only guarantees that they shall not be impaired by the state or the United States, as the case may be." (*Logan v. United States*, 144 U. S. 288.)

² *Gibson v. Mississippi*, 162 U. S. 565; *Plessy v. Ferguson*, 163 U. S. 537.

³ *Logan v. United States*, 144 U. S. 263.

⁴ *Walker v. Sauvinet*, 92 U. S. 91.

unless the state regulates it to conform to its ancient meaning, it is not "due process," but a perversion thereof.¹

Due process of law implies that the person whom it is sought to deprive of his life, liberty, or property shall have an opportunity to dispute the charge or claim made against him, and the allegations upon which it is founded, and that the material matters disputed shall be fairly inquired of, and the case decided as the law and its merits require. To accomplish this there must be a court or tribunal, regular allegations, opportunity to answer, and a trial according to some settled mode of judicial proceeding.

If the state provides due process of law, an erroneous decision of the state court in the administration of justice under it does not violate the Fourteenth Amendment. There must be such a defect in the state law as deprives the trial, or proceeding, of the requisites of due process of law.² So construed, the amendment, however, gives to the Supreme Court an enlarged jurisdiction over the administration of justice in the states, respecting life, liberty, and property.

This jurisdiction, taken in connection with the liberal provisions of the acts of Congress providing for the removal of causes from the state courts to the courts of the United States, in cases arising under the Constitution or laws of the United States, secures to the citizen, in a very high degree, national protection against the injustice of a state. It also tends to place the state above the desire to commit that injustice which the federal power may correct. Thus the Fourteenth Amendment does not destroy state rights and powers. It secures them. If the state laws deny equality of rights, or due process of law, it corrects them. It supersedes them, if necessary, for the protection of rights conferred by the Constitution upon the negro; or, if necessary, for the freedom and fairness of the election of representatives in Congress.³ It interferes for the protection of officers acting under federal authority.⁴

The national and state systems remain intact, parts of an

¹ *Murray's Lessee v. Hoboken Land Co.* 18 How. 272.

² *Arrowsmith v. Harmoning*, 118 U. S. 194.

³ *Ex parte Yarbrough*, 110 U. S. 651.

⁴ *Tennessee v. Davis*, 100 U. S. 257; *In Re Neagle*, 135 U. S. 1.

undivided whole, the greater not encroaching upon the less, but supervising its action, in cases where the horizon of the state fails to be broad enough to grant to all without discrimination due process of law, and the equal protection of the laws.¹

The seceding states have found in the Supreme Court their champion and preserver. The judgment of the people, matured by time and modified as the generation which participated in the rebellion passed away, indorsed the action of the Court. The Court which in the earlier years of the government developed the Constitution, and made it adequate to the existence and maintenance of the nation in its struggle against state opposition and supremacy, in the later years has preserved the states against the superior strength and undue supremacy of the nation. First, it made a place for the nation, and second, it saved the places of the states.

Chief Justice Waite, in *Cruikshank's case*,² reiterated the old doctrine, which it is probable will never be shaken:—

“The government of the United States is to some extent a government of the states in their political capacity. It is also for certain purposes a government of the people. Its powers are limited in number but not in degree. Within the scope of its powers as enumerated and defined, it is supreme and above the states; but beyond it has no existence. . . . It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction. . . . All that are not so granted or secured are left under the protection of the states.”

The language of the Court in *New York v. Miln*³ has been often repeated.

“A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness, and

¹ *Yick Wo v. Hopkins*, 118 U. S. 356.

² 92 U. S. 542.

³ 11 Peters, 139.

prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, when the power over the particular subject or the manner of its exercise is not surrendered or restrained by the Constitution and laws of the United States."

CHAPTER XVI.

ACTION OF THE COURT UPON OTHER IMPORTANT QUESTIONS.—POLICE POWER.—OBLIGATION OF CONTRACTS.—CORPORATE COMBINATIONS.—TERRITORIAL EXPANSION.—LEGAL TENDER.

FIRST in economic importance may be mentioned the power in Congress “to regulate commerce with foreign nations and among the several states.” From these few words a body of laws has been developed by the decisions of the Court, vitally affecting commerce, and strikingly illustrative of the aptness of the text of the Constitution to meet the exigencies of new conditions. Commerce includes navigation, water and land transportation of property and passengers, intercourse, and necessarily the instruments of traffic such as ships and railroads and telegraphic lines on post roads. Whatever affects the regulation of commerce with foreign nations or among the states is committed to Congress. Whatever obstructs, taxes, or burdens such commerce, or discriminates in its rates or charges, is to some extent a regulation, and thus within the control of Congress. The power is a national one, and the states have no voice or power in the matter except as permitted by the nation. They can regulate commerce which begins in a state and never passes its boundary, but all commerce which passes state lines is within the exclusive control of Congress. Unless Congress otherwise declares, all interstate commerce is free. Many cases have arisen in which the legislation of states has been declared void, because either a direct or indirect encroachment upon the exclusive power of Congress. In the first cases¹ the court said that the whole power to regulate commerce among the states was vested in Congress, and therefore there was none in the states. But in those cases Congress had acted. In the next

¹ *Gibbons v. Ogden*, 9 Wheaton, 1; *Brown v. Maryland*, 12 Wheaton, 419.

case¹ Congress had not acted, and the Court refused to overrule the action of the state. Thence arose the doctrine, sometimes allowed and sometimes disallowed, that if Congress has not acted the states can act, the argument in favor of state action being that if Congress has not acted, state action does not conflict with national action; the opposing argument was that as the Union has all the power, none remains in the state. Finally the long-waged contest seemed to incline in favor of the exclusive power of Congress,² but with numerous exceptions in favor of state action, in the absence of congressional action. These exceptions to the rule present an interesting chapter upon the pressure of circumstances in the construction of a text, and in the evolution of rules from the varying constructions. The fact was that a strict adherence to the doctrine of the exclusive power of Congress, whether exercised or not, in respect to interstate commerce, was in some cases impracticable and in others unwise. Some of the members of the Court were inclined to dispense with the rule in cases of hardship or of action by the state, while others regarded this as treason to the Constitution. The powers of the states were at stake, the judges had different views, the successive cases presented distinguishing facts, and thus the line of decisions seemed to be a wavering one. But their general trend upon the commercial clause of the Constitution was gradually developed. The exclusive power of Congress to regulate foreign and interstate commerce was established in every case where it had acted, and so far as it had acted, but notable exceptions were admitted in the absence of congressional action. Thus when state regulation is fitted to local needs, and Congress has not taken the subject in hand, and the action of the state tends rather to assist commerce than to regulate or burden it, as in the case of the improvement of a particular harbor, its pilotage, beacons, buoys, wharves, the construction of a bridge over a navigable river wholly within the state, and the proper police supervision, the Court makes the distinction between aids to commerce and its instruments, and the regulation of commerce, and thus finds its way to permit state

¹ *Wilson v. Blackbird Creek*, 2 Peters, 245.

² *Leisy v. Hardin*, 135 U. S. 100.

action within the range of local needs.¹ The subject is still a complex one, the difficulty being not so much in determining what the rules are, as in determining whether the facts in the particular case bring it under the general rule or under some one of the exceptions. When we compare the great commerce of to-day with the small commerce of 1789, and consider how enterprise and invention have revolutionized and expanded its field and its instruments, and by multiplying its benefits have stimulated the cupidity and avarice of its votaries, we cannot but admire the judicial statesmanship that has found in the simple commercial clause of the Constitution the power and chart to utilize its beneficent forces, and to reduce to harmony and justice its passionate struggles for state privilege, at the expense of interstate rivals. The Court may not always perceive the true line of division between the state and national power, but with vision cleared by the widening range of cases, it profits by discovering where it has missed it, and thus is enabled to draw nearer to it.

Although Congress cannot directly regulate the commerce which is confined within a single state, it indirectly does so in the case of telegraph lines. It has passed an act permitting them under specified conditions to become instruments of the government for the purposes of its service, and has prescribed regulations in respect to lines crossing state boundaries, and connecting lines within a state, which thus became part of the interstate line. This the court has sustained.² Congress can create banking, telegraph, and railroad corporations, not indeed

¹ In *Covington v. Kentucky*, 154 U. S. 204, the Court divided its past adjudications with respect to the power of a state over commerce into three classes:—

1. Where the commerce is not foreign or interstate, but begins and ends within the state, and does not materially affect the commerce that is interstate, the state has plenary power, and therefore Congress has none.

2. Where the commerce is interstate, and Congress has not taken the regulation in hand, then the state may aid it by action as to its local needs as specified in the text, but action by Congress upon these subjects will supersede state action upon them.

3. The state can make no regulations which are national in their character, such as taxation upon interstate commerce, or by imposing any discriminating burdens upon it.

² *Pensacola Tel. Co. v. Western Union*, 96 U. S. 1; *Western Union v. Alabama*, 132 U. S. 472.

for purely private purposes, but as governmental agencies.¹ If Congress should pass a general act, allowing railroad companies whose roads cross state boundaries, or connect with such roads, to incorporate or reincorporate for interstate commerce² and as governmental agencies, and declare them such agencies, it is possible that it could draw to itself full power over them, especially if, as in the case of state banks,³ it should impose an onerous tax upon the business of the state corporations.

The Constitution is silent respecting the police power. So far, therefore, as it is not involved in the granted powers or implied by them, it is reserved to the state or the people. It is the power to make and enforce proper regulations for the protection of persons and property and for the general welfare. This broad definition embraces an undefined field of particulars. The importance of the police power of the states in limiting the scope of our national jurisdiction was little noticed at first. It did not suffice to prevent a master from capturing in a free state his escaped slave.⁴ In the state taxation of immigrants it temporarily rose superior to the commercial power of Congress.⁵ It permitted a state under cover of its banking system to emit bills of credit.⁶ It gathered new vitality in the so-called granger cases,⁷ a vitality which it retains in respect to private property affected with a public use, and not directly an instrument of interstate commerce. The power, however, must be used to promote useful service and not to cripple or destroy it, or to confiscate property.⁸ It seemed to be wholly withdrawn from interference with interstate commerce in the original package case,⁹ but by the aid of Congress was reinstated as to intoxicating liquors,¹⁰ and may possibly in like manner be made paramount as to other merchandise.

It has triumphed over alleged constitutional limitations in

¹ *McCulloch v. Maryland*, 4 Wheaton, 316.

² *Casey v. Galli*, 94 U. S. 673.

³ *Veazie Bank v. Fenno*, 8 Wallace, 548.

⁴ *Prigg v. Pennsylvania*, 16 Peters, 539.

⁵ *New York v. Miln*, 11 Peters, 102. ⁶ *Briscoe v. Kentucky*, 11 Peters, 257.

⁷ *Munn v. Illinois*, 94 U. S. 113, and other cases like it.

⁸ *Chicago Rwy. Co. v. Minnesota*, 134 U. S. 418.

⁹ *Leisy v. Hardin*, 135 U. S. 100. ¹⁰ *Re Rahrer*, 140 U. S. 545.

respect of such provisions of the charter of a private corporation as purport to confer privileges injurious to the public health, safety, or morals. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state, but no legislature can curtail the power of its successors to make reasonable laws for such purpose. The contracts which the Constitution protects relate to property rights, not governmental. No legislature can bargain away the public health, safety, or morals.¹ The police power of the state is ample to regulate the charges of corporate monopolists in the necessities of life,² the hours of health destroying labor,³ fishing and hunting,⁴ to suppress the manufacture and sale of liquor,⁵ to require the labeling of oleomargarine,⁶ the cessation of labor on Sunday,⁷ to regulate the prices of elevator charges,⁸ and washing and ironing in public laundries.⁹ In many other ways it has protected the public against fraud, and vicious and harmful acts. But the power cannot be invoked to justify class discrimination, or oppressive or unjust legislation.¹⁰ It must not extend favors, or deny liberty, unless actually needful to do so to prevent its abuse to the prejudice of the public welfare. Without judicial supervision the police power would become dangerous to liberty; with that supervision it regulates liberty.

There has been no relaxation of the rigor with which the Court has maintained the obligation of contracts against state impairment. There has been a broader perception of what the states may not make the subject matter of their contract with persons and private corporations, and a more rigid construction in favor of the state of the extent and limits of its grant. What the state does not in terms grant cannot be implied to its prejudice. While a state cannot sell its powers, it may, when the public interests require it, confer the exercise of its right of

¹ *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union v. Crescent City Co.* 111 U. S. 746.

² *Spring Valley Water Works v. Schottler*, 110 U. S. 347.

³ *Holden v. Hardy*, 169 U. S. 366. ⁴ *Lawton v. Steele*, 152 U. S. 133.

⁵ *Mugler v. Kansas*, 123 U. S. 628. ⁶ *Powell v. Pennsylvania*, 127 U. S. 678.

⁷ *Hennington v. Georgia*, 163 U. S. 299. ⁸ *Munn v. Illinois*, 94 U. S. 113.

⁹ *Barbier v. Connolly*, 113 U. S. 27. ¹⁰ *Yick Wo v. Hopkins*, 118 U. S. 356.

eminent domain upon such corporations as need the power to acquire private property for railroads, public water supply, and the like. Grants to corporations are now usually subject to the power reserved by the state to repeal their charters or modify them, and thus the state may control in a reasonable way corporate privileges, but cannot confiscate corporate property, or deprive corporations of reasonable compensation for their services.¹

Possible danger to property rights lies in the power of the Union to regulate the value of money. It has ample power to provide the best, but the fallacy widely prevails that the law of Congress declaring the value of money is more potent than the long experience, custom, and belief of mankind. Poor money will drive out good money.

The Constitution denies to a state the power to coin money, to emit bills of credit, to make anything but gold and silver coin a tender in payment of debts. This was an additional check against state dishonesty. The state of Missouri issued bills of credit in 1821. The Supreme Court held them to be void, and thus enabled the state to escape from the obligation of her contract to redeem them. But the particular evil was more than compensated by the general good.

No power is expressly conferred by the Constitution upon the nation to make anything but gold and silver a legal tender. Congress has the power "to coin money and regulate the value thereof," that is, of coined money. The paper promise to pay money is not money. It is only its equivalent when the promise is so secured as to make it unbreakable by the promisor. Hence to compel the creditor to take a promise instead of the money may result in defrauding him. The uncertain value of paper currency is a menace to business interests and to the obligations of contracts. Nevertheless, the Supreme Court has held that the power to make the notes of the United States such tender exists;² that Congress has the power to borrow money, and therefore the power to issue its notes in the form most convenient and useful; that Congress is not forbidden by

¹ *Smyth v. Ames*, 169 U. S. 466.

² *Juilliard v. Greenman*, 110 U. S. 421.

the Constitution to make the notes a legal tender, and does have the power to make such enactments respecting them as will make them most conducive to the public welfare ; that its judgment that the quality of legal tender impressed upon these notes is most conducive to the public welfare is its judgment upon a political question, and thus within its discretion, and therefore permissible. This decision implies the unshaken confidence of the Court in the stability of the Union, and in the wisdom of Congress in regulating the value of money.

In 1892 the Court held that the legislatures of the several states have exclusive power to direct the manner in which the presidential electors shall be chosen, and such choice may be by the legislatures directly, or by popular vote in districts, or by general ticket.¹

Relief against the pressure of competition and of the expense of operation in our great industries has in recent times been largely sought in the consolidation of the competitors into a single organization. This consolidation in its earlier history was called a trust, for the reason that powers were confided to the managers of the organization in trust for the benefit of the several constituents forming it. As corporations could not lawfully abandon their functions in this way, the trust was superseded by a large corporation under a single direction. The object is to cheapen management and production, and by the magnitude of the business to influence or command the market ; in other words, to obtain a monopoly. Congress passed an act denouncing as illegal every such trust in restraint of trade or commerce among the several states. The Court held that such an aggregation for the refining and sale of sugar to be carried on in Philadelphia was not covered by the act, since the manufacture of a product was not commerce in it ; the product itself was the subject of commerce ; Congress could not restrain its production in any state. Conceding that a monopoly was intended, the state alone could suppress it within its own limits. The product could not come within the commercial regulation of

¹ *McPherson v. Blacker*, 146 U. S. 1. The case contains an interesting history of the different methods of choice in the different states, and the changes in the methods adopted from time to time.

Congress until it commenced its final movement from the state. Then the movement might come under the regulation of Congress, but could not be arbitrarily prohibited, nor could the corporate owners of the product itself be annihilated because by possibility they might be able to influence or control the market.¹ But when several railroad companies whose roads traversed several states entered into an agreement for regulating and maintaining as regulated the prices to be charged by them for interstate transportation, the Court held the agreement illegal as a violation of the act of Congress, passed within its power to prohibit restraints upon interstate commerce.²

The national power to prohibit monopolies, whether created by combinations in restraint of production, trade, competition, or by the unfair use of large capital in crushing out small dealers, seems to be limited to interstate and foreign commerce. In all other fields, the power is in the state.

The combination of many corporations into a single great one is a feature of modern business methods. Respecting the power of the states to regulate such combinations, it should be observed that the liberty of trade should not be infringed when free from any element of wrong, but this liberty implies the liberty of both buyer and seller, and is stifled when either party has by an abuse of his money power obtained a coercive advantage over the other. The ability to extort is the death of commercial conscience. Extortion, or the intended acquisition of the power of extortion through monopoly, is the wrong to be prohibited, restrained, or punished, no matter under what guise it appears. The threatened evil is not without remedy. The state which charters a corporation can reserve to itself the power to supervise and regulate it, and to forfeit the charter if the corporate powers are used in violation of law. The state which admits a foreign corporation to do business within its territory can prescribe the conditions of such privilege. These conditions should be reasonable ; there should be no confisca-

¹ United States *v.* Knight, 156 U. S. 1 ; Anderson *v.* United States, 171 U. S. 578, 604.

² United States *v.* Freight Association, 166 U. S. 290 ; United States *v.* Joint Traffic Association, 171 U. S. 505.

tion of property, no denial of due process of law, no compulsory acceptance of unfair prices. Except as to interstate and foreign commerce, each state can regulate upon sound principles of public policy the business of every corporation within its limits. These regulations may limit prices to a scale fairly remunerative, may include a tax upon the business, the franchise, or the profits. The state may appoint a board of control with inquisitorial powers. It may denounce as a crime and prescribe the punishment of extortion and such acts of the managers as are committed with an extortionate intent. It may declare that the inflation of capital beyond actual values is evidence of such intent, and may prohibit such inflation. As to interstate and foreign commerce, Congress may make like regulations, and proclaim free trade with all the world as to imports.

While the power of the government, both of the state and of the Union in their respective spheres, is ample to restrain or redress such wrongs, the wisdom necessary to the proper use of the power, as in most other cases where the activity and cupidity of men take new forms and create new conditions, must be evolved through experience. Care must be taken to distinguish between the evil done to the few through changes in the conditions of production and trade, and the wrong which monopolists may be presumed to intend up to the limit of their sense of safety to themselves. Individualism has been the mainspring of American success. It is recognized in the Declaration of Independence, and in the constitutional provisions inhibiting governmental invasion of its honest exercise. It cannot be hampered because it is successful, or because its success is very great, but only when its tendency is to injure others by abusing its accumulated wealth and power. It is rare that individuals, apart from corporate combination, command wealth and power enough to presume upon abuse to the public injury. When their business is a control of the public interests, the state may regulate it.

The power of abuse comes from the great power of corporate wealth and franchises. This corporate power cannot exist except by the consent of the government. The government can impose the conditions of its consent, and thus impose salutary

restraints upon the power. Whatever mistakes the government may make in its initial efforts to protect the public from corporate aggressions and abuses, there can be no doubt that it will finally solve the difficulty by making it unprofitable for such combinations to abuse their privileges, and it will do this without disabling them from according to the public the benefits resulting from the honest employment and the fair earnings of great wealth, enterprise, and ability.

In *Re Debs*,¹ the Court upheld an injunction in an action brought at the instance of the Attorney-General of the United States to restrain the unlawful and violent interference by Debs and his associates with interstate commerce and the transportation of the mails. The action of the Court was bitterly assailed in the interest of the objectors to all interference in such disorders, as an unprecedented usurpation and perversion of judicial power. But as the passions of the hour subsided, its efficacy in preventing like disturbances was recognized.

In *Pollock v. Farmers' Loan Company*² the Court held an income tax falling upon the income from real estate and personal property to be a direct tax, and because not apportioned among the states in proportion to their representation, to be unconstitutional. This excited the clamor of those not exposed to its exactions. But the people recognized that the decision was a just blow at the attempted extortion by the poor from the rich,—a blow which a popular legislature might attempt, but which the judicial power should not countenance.

In matters of indirect taxation both nation and state are held to have concurrent powers, except with regard to imports and foreign and interstate commerce, but neither government will tax a governmental instrumentality of the other; for the power to tax is the power to destroy by increasing the weight of the tax.

The United States will not punish crimes except those declared by its own statutes; this, for the reason that it can make no law except within the legislative powers granted to it, and hence it can have no common law to be violated.³

¹ 158 U. S. 564.

² 158 U. S. 601.

³ "Its provisions are framed in the language of the English common law, and are to be read in the light of its history." (*Smith v. Alabama*, 124 U. S. 478.)

In view of the common law definition of citizen, the Court decided that a child born in the United States of Chinese parents, themselves aliens but residents and domiciled here, and not in the official service of China, became at its birth a citizen of the United States under the first clause of the Fourteenth Amendment. And this notwithstanding the fact that its parents by virtue of our laws were incapable of becoming citizens, and the people of its race were since its birth denied the right to enter our territory.¹

New constitutional questions have arisen under the expanding development and interests of the Union. Our arms have subjected to our control Porto Rico near our southeastern coast, and the Philippines on the opposite side of the earth. Diplomacy has brought Hawaii under our jurisdiction. We have the constitutional right thus to enlarge our dominions, and to govern the territories so acquired. What that form of government shall be it is for Congress to determine, subject of course to the provisions of the treaty by which the territory was acquired, and subject also to the existing vested private rights of the people other than political, but in no case in violation of the prohibitions of our Constitution. Thus we governed the Louisiana and Florida territories before their admission as states, and by like construction of the Constitution we govern Porto Rico, the Philippines, Hawaii, and Alaska.² We do not by their acquisition make them part of the Union. The Constitution does not by its own vigor extend to their peoples. They are subject peoples whose master is a wise and kind guardian, benevolent in most things save commercial transactions, and just in them.

#Boutke

The possession of power and the wisdom of its exercise are separate matters, although often confounded. Congress has the power to declare war.³ The war may end in conquest of the enemy's country. The conquest may be confirmed by treaty. Other territory may be acquired by treaty without war, as in the Louisiana and Alaska purchases. The provisions of a treaty not itself in contravention of the Constitution become

¹ *United States v. Wong*, 169 U. S. 649.

² *Dorr v. United States*, 195 U. S. 138, and cases there cited. ³ Art. 1, sec. 8.

the supreme law of the land. The countries thus acquired become the territory of the United States, that is, within its jurisdiction.¹

The Court has declared the sovereignty of the Union to be complete in respect of the power confided to it in its foreign relations.²

Congress has "power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."³ The power being conceded, the practical question is political; what is it wise to do with the territory thus acquired? Shall Congress "dispose of" it, or govern it? Such territory as adjoins the states of the Union, and may in time be fit to be admitted as new states, may be kept. Other territory, like Alaska, too barren to support many people and yet sufficiently productive of fish and game to justify its holding as property, may be kept, and "regulated" by some sort of district government. Hawaii may be worth keeping as a convenient storehouse of military supplies, and may be accorded limited self-government. Porto Rico and the Philippines are alien to us in race, habits of thought, and in the spirit of nationality. They are separated from us by intermediate seas, and we may never make Americans of their people by assimilation. As territories they might be "disposed of" under the Constitution. We have already disposed of Cuba by giving her to her people. This political question the Court will not review;⁴ it involves the wise use of conceded power. In its use the spirit of the Constitution should prevail.

If the United States may govern Porto Rico and the Philippines as dependent colonies, denying to them any hope of admission as new states into the Union, then if it should by conquest or otherwise acquire the South American or other foreign states, it could govern them in the same way; thus the Union, which was intended to be solely for the states and for such territory as was in pupilage to become states, and for the people of the states and such territories, would become a gov-

¹ Am. Ins. Co. v. Canter, 1 Peters, 511.

² Chinese Exclusion case, 130 U. S. 581.

³ Art. 4, sec. 3.

⁴ Luther v. Borden, 7 How. 1; Re Cooper, 143 U. S. 472.

ernment of vast external dominions, whose interests and whose armies might in the end dominate those of the states. It is the theory of the Constitution that the Union shall rely upon the militia of the states, and as little as possible upon a standing army and navy, even though recruited from the states of the Union. Establish governments in distant provinces and recruit their armies from the natives, and in time the Union may be crushed by treason at home aided by revolting provinces and colonies abroad. We may nourish the infant alien and rear a treacherous enemy. England may yet fall beneath the power she is training in India and the other quarters of the earth.

The power existing, experience shows that it will be used. In that case, subject to the treaty provisions, Congress must make all needful rules and regulations. In legislating for the territories, Congress exercises the combined powers of the general and of a state government.¹ The President has such authority over these distant possessions as Congress confides to him. "He shall take care that the laws be faithfully executed."²

When the people of these islands become subject to the United States, it is not to its unlimited sovereignty as exercised in its foreign relations, for the people subject to its sovereignty cannot be foreign to it, but they are subject to its limited sovereignty, that is, powers denied cannot be exercised. The people have a right to laws and courts, which, as the Union can make none contrary to the Constitution, must be subject to it. The United States Supreme Court may be granted jurisdiction to review the judgments of the courts of those islands, so far, at least, as to confine them to their proper jurisdiction,³ and so far as Congress, or the President, acting under the authority of Congress, provides.⁴ What are inalienable rights here are inalienable there, but rights conferred by our Constitution upon ourselves are not thereby conferred upon them.⁵ It must be as true there as here that "No man is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest,

¹ *McAlister v. United States*, 141 U. S. 174.

² Art. 2, sec. 3.

³ *Re Cooper*, 138 U. S. 404; 143 U. S. 472.

⁴ *Dorr v. United States*, 195 U. S. 138; *Kepner v. United States*, ib. 100.

⁵ *Hawaii v. Mankichi*, 190 U. S. 197.

are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government; and every man who by accepting office participates in its functions is only the more strongly bound to submit to the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government.”¹

Our system of popular elections has thus far been the safer and better because its benefits and burdens are mainly felt by ourselves; the incentive is toward good results. But if we thrust a colonial policy into our party contentions, we make the fate of our distant possessions the football of our domestic politics. What party out of power would hesitate to promise to reverse the most excellent colonial system, if thereby it could gain a presidential election? Our most sacred trust to safeguard the rights and happiness of distant millions might be betrayed under such an incentive. Does not our popular system make it morally wrong for us to assume such a trust?

The few decisions cited from the vast multitude in the reports, aside from their value as authority, illustrate the importance of the Court and of its labors. Upon these labors depend two fundamental essentials to the stability and excellence of our government: First, a clear, authoritative and just ascertainment and application of established power, and the rejection of its opposite, unauthorized power; second, the observance of the true line separating the national and state powers, confining each within its own field. The government must be of the law and by the law, otherwise it may be the whim of power. The law must be declared with an accuracy as nearly scientific as possible, otherwise confusion and anarchy may prevail. This is especially necessary in a popular government. The popular will, under the pressure of supposed interest, is not judicial; the safety of popular government consists in providing by means of its fundamental law a judicial system, exempt from unjudicial excitability and fickleness.

¹ Mr. Justice Miller in *United States v. Lee*, 106 U. S. 196, 220.

CHAPTER XVII.

SOME EXPLANATION OF THE STABILITY AND SUCCESS OF OUR DUAL SYSTEM OF GOVERNMENT.

THE relations which the United States holds to the states are peculiar. The United States can hardly be said to have physical existence. It is rather a power than a body,—a power like gravitation, compelling stability and order, and most felt when most resisted. It holds a small township on the Potomac, where its principal public buildings and the headquarters of its chief officers are situated. The imperial domain of the continent is parceled among the states, existing or to exist. The United States, it is true, owns land in the territories, and in some of the states, but this it purposed to sell, and then the states will govern those who occupy it. It cannot buy land in any state upon which to erect a fort or public building, without obtaining the “consent of the legislature of the state.” In short, it is a great corporation, of which all the states and territories and all the people in them are members. It is itself invisible, but its power and influence are always and everywhere present. We confide in its presence and power, though we have no need or desire to invoke or witness them. It is the corporate bureau of national affairs for the states and people, with full ownership of the bureau and of the land and property held by it, and subject in all things to the charter of its creation, with full control of the business committed to its care, but with no control whatever of the business reserved to the states, except as the interdependence of the nation and states gives to the nation the power in case of dispute to trace its chartered line, and compel respect for its chartered powers.

The simple and successful governments in the states gave the framers of our Constitution great encouragement. Local

self-governments were successfully established. But so long as they remained divided in counsel and action, they lacked the strength necessary for their safety, and the harmony essential to the general welfare. "Join, or die," had been the watch-word which led to the union against Great Britain. "A more perfect union" was the object of the framers of the Constitution. The greatest obstacle to the framing of a more perfect union was state sovereignty, or the jealous care with which local self-government was cherished. The greater the power of the national government, the greater was the need of care to guard the liberties of the people and the rights of the states. The South American states were practically wrecked upon the threshold of their independence by their inability to establish the proper relations among the provinces composing the state, and between them and the state itself.

It was not necessary to construct the whole system of government from its foundations. The local self-governments constituted the foundations upon which the national system was to be erected, and models to aid in shaping the new structure. Nevertheless, the hostile and disturbing forces in society and among the states had to be regulated and balanced. The counterpoises between liberty and authority had to be adjusted, so that however violent the oscillations, they must always tend toward repose in equilibrium.

Two propositions of Mr. Madison, as stated by him in the fifty-first number of "The Federalist,"—first, the government must control the governed; second, it must be obliged to control itself,—touch or reveal the secret of all proper government. In order to control the governed the government must possess all the powers necessary for the purpose. It must be able to maintain and secure its own existence, and must be able to compel obedience. "A government," says Mr. Hamilton, "ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control but a regard to the public good and to the sense of the people."

The framers of the Constitution recognized the principle

that whatever powers should be conferred upon the United States must be full and complete, otherwise there might be such a lack of unity, energy, and authority as would in some important crisis prove fatal. The powers conferred by our Constitution are few and soon counted, but they are complete in themselves and ample for the purpose intended. These powers are self-executing in some cases and need no further laws; in other cases the laws regulate and guard their exercise; some of the powers may be held in abeyance; the laws cannot abrogate them; however long in abeyance, a future legislature may provide for their use. Power should be governed by law, but where the exercise of the power is defined and regulated by the Constitution, no further law is necessary.

Starting with the assumption that whenever a power is conferred by the Constitution to do anything, every power necessary to do that thing is conferred,—that is, supreme power with respect to that thing,—the practical and important object to be attained is to protect the people from the abuse of this power. This must be done by such provisions in the Constitution, or by legislation under it, as express or clearly imply the distinction between the proper and the improper use of the power, and also by affording some practicable remedy for the abuse of the power. Every right must have its remedy, and the remedy must be either sword or shield, or both, as the exigency requires. Bad governments usually have most excellent laws so far as the declaration and definition of private rights and the prohibition of wrongs are concerned; but the remedies for the punishment of offenders and for the redress of wrongs are so inadequate, inefficient, or impracticable as to nullify such laws.

That justice must not be bought or sold, denied or delayed, was the keynote of Magna Charta. If the government is true to this idea, the people will be true to it. Every power must consist with this end. Every means must be subordinate to it. The system and machinery of our national government were certainly devised in this spirit. Before the Constitution was adopted, the state system of government was imbued with the same idea. In making a single national system independent of

separate state control, the idea was preserved and given efficient safeguards.

An examination of our system of government in the light of its practical operation will bring to view the following securities for the good conduct of those intrusted with power, and safeguards against the encroachment of authority upon liberty:

First. There is not sufficient power lodged in any one man or body of men to enable him or them to oppress the people. This result is attained by the division of the great powers of government, namely, the executive, the legislative, and the judicial, among separate groups of officials. If these were all vested in one man or body of men, then such man or body of men might usurp, if they should not possess, all the powers necessary to oppress the people. But when they are separated, so that those belonging to one group are given to one class of officers, and those belonging to another group to another class, and those of the remaining group to a third class, then the totality of the powers of the government is so scattered or distributed that too few of them unite in any one man or body of men to enable him or them to tyrannize over the people.

Second. The powers which are the most dangerous if abused, or most liable to abuse, are committed to officers with short terms of office. The interest of the people is stimulated and refreshed by the frequent return to them of the duty and privilege of election; the conduct of the officers is the more carefully watched by those who desire to eject them, or to obtain their positions. The officer will have neither the power nor length of service sufficient to enable him to oppress the people, but will naturally be ambitious to render useful service.

Third. The national powers are distinctly separated from those of the state. This prevents control of the state governments by the nation, and deprives the nation of power to oppress the states, or make any state the instrument of oppression. The moment the nation passes out of its appointed sphere of action, it is utterly powerless. If it attempts to usurp power in a state, it is a wrong-doer, and is instantly treated as such. Besides, power is usually so decentralized in the states that it has no single official master. The law is

the superior. The governor is chosen by the people, and his duties are prescribed by law. The same is true of the inferior officers. They are chosen by the people of their districts, and the governor is not their commanding officer, nor do they look to him to prescribe their duties. They are the servants of the law, and if they fail in their duties, the law prescribes the penalties, which the courts may enforce. These inferior officers owe their positions to the people, and naturally recognize their responsibility to the people and to the law. It follows that in the states official power cannot be centralized, and therefore cannot well be made the servant of any one master. If the President were to seek for it with the view to its control, it would forever elude his search. Even if the governor of the state should seek to grasp it, the system of decentralization would baffle him.

The national power, limited to national purposes, is centralized, and safely and properly so. The President is the only executive officer elected by the people. All the others are either directly or indirectly appointed by him. The nation must be united and harmonious in executive action and complete in its powers, both as respects foreign nations and its home affairs. It would be unwise and impracticable to attempt to elect by the people of the nation ambassadors to foreign governments; they represent the government as administered, and must be subject to its direction, and therefore to its appointment and removal. It would be equally impracticable and unwise to elect by the people such officers as post-masters and revenue collectors. They could not well be elected by the people at large; and if they should be elected by the people of districts, they would feel more responsibility to such people than to the administration, and hence might thwart the national scheme. The same may be said of the other officers in the civil service of the nation. The centralization of national power secures unity, harmony, and efficiency at home and abroad.

The national power cannot be dangerous where it cannot extend. The President of the United States has no official superiority over the governor of a state. Congress cannot by

law require a governor to do anything. The Supreme Court has decided that Congress may request but not command the governor to comply with the constitutional provision for the surrender of the criminal who flees from the state where he committed crime into another state.¹ Public officers are powerless unless the law is on their side, and they are liable to be haled before the courts for an abuse of their official trust, or for action in excess of it.

Fourth. These separate powers committed to separate officers are so coördinated that the proper action of every department is usually necessary to the successful working of the government. Every department, therefore, is stimulated to perform its assigned duty, so that no fault may attach to it. Every department is in some sense a detective of the defaults or abuses of the others.

Fifth. The power of amendment of the Constitution exists, properly guarded to prevent hasty use, but adequate to the correction of real defects or abuses.

Sixth. The participation of the people in the government, the publicity of its action, freedom of discussion, frequent elections, manhood suffrage, the virtue and intelligence of the people, their love of liberty and justice, their love of their country and its institutions, are constant forces tending not only to strengthen and perpetuate the government, but to bring it and hold it to a very high degree of excellence. This general classification of the features of our system, tending towards stability and excellence, will admit of extended specialization and illustration. Secondary coöperating factors are numerous. We can only glance hastily at the most important.

The national legislature has its limited range of legislative powers; the state legislatures have the rest. The state legislatures keep watch and ward against national encroachment. The Supreme Court of the United States is the tribunal which nullifies the action of either national or state legislature infringing upon the other. As each legislature has a defined scope of powers which the other must not use or invade, the national and state legislatures, instead of coöperating to oppress the

¹ Kentucky *v.* Dennison, 24 How. 66.

people, may be relied upon to watch each other, and to expose and counteract any exercise of power which is dangerous to the people or their liberties.

Again, the legislatures do not enforce any of the laws they make. That function belongs to the other departments. There is often a display of power and consequence in the execution of a law which does not attach to its enactment. The legislatures give to the executive officers that consequence and power; they do not retain it themselves. Their jealousy of the power they confer tends to make them cautious in conferring it. It is less probable that the legislature will make a bad law for the other departments to enforce, than it would be if it should enforce it itself. It is more inclined to impose limits upon the action of the other departments than to grant extensions of power. Each department, possessing its own group of powers, instead of combining with the other departments to oppress the people, becomes a wholesome check upon such oppression. The tendency of the legislature usually is to encroach upon the powers of the other departments. It cannot exercise them, but it can in many ways limit and direct their exercise. These departments are naturally watchful of their own powers, and they resist in every practicable way the legislative encroachment. The Constitution is the limit of legislative power. It protects very fully the executive powers, and to some extent the judicial powers, from unauthorized encroachment. Separate departments with separate powers, and short terms of service, lessen the danger of collusion by lessening the temptation and opportunity. On the other hand, the ambition of the officer to deserve well of his country and of the people is stimulated; he desires to retain his office, or pass from it to a higher one; he confines himself to his own functions and becomes better qualified to discharge them; better qualified to guard the line which separates his department from others; more disposed to protect the system which gives him position and emolument; more disposed to shun the evil practices which promise failure, disgrace, or retirement.

With respect to the legislative department, additional security results from the two chambers, unlike in their origin and

duration of power, and inspired by the like jealousy of each other. Treason in one house could not survive its detection in the other. "The great security," says Mr. Madison, "against the gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of others. The provision for defense must in this as in all other cases be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

Mr. Madison further remarks, "Our pride and vanity attach us to a form of government which favors our pretensions." But pride and vanity may be the very forces which move us to virtue. How far selfishness degrades an action otherwise noble and virtuous, we need not pause to discuss. A just action excludes the occasion for imputing a bad motive. We honor the man whose life is pure and honest, though his fundamental maxim may be that "Honesty is the best policy." Montesquieu is right in saying that a republic depends upon virtue, meaning virtuous action. Mr. Madison, securing all the aid virtue can render, would also obtain from lower motives the same result which Montesquieu ascribes to virtuous motives. A government which permits every citizen to take equal part with every other, which permits the humblest to aspire to the highest place and sometimes to gain it, must strongly appeal to the pride and vanity of all that vast mass of people who, if the government should not open the way for them to participate in its functions, would never think of opening it themselves. It is certainly better that they should be for the government than against it.

It was Mr. Madison's idea that since human infirmities exist, they should be used so as to do the most good, and thus produce the least evil. He would use one human infirmity to counteract another, as power against power, ambition against ambition, avarice against avarice; he would place envy and jealousy as spies upon dishonesty and corruption, one party against another, the outs against the ins. Government does not create men; it must deal with them as they are; and since they are possessed of the weaknesses incident to humanity,

which, if not properly employed, restrained, and regulated, might end in ruin, there is no choice but to do the best you can ; you must resort to the wisest expedients ; you are not responsible for your lack of angels ; you are responsible for putting men to the best use they are fitted for. Compelled to make a choice of evils, it is your duty to choose the least. But in this adjustment and balancing of destructive forces the virtues are cultivated. Both public and private good are made incitements to virtue, and punishment and disgrace deterrents to vice.

The framers of the Constitution assumed the existence of two qualities or conditions : the virtue of the people, and the ambition and selfish interest of their leaders. With respect to the people, their desire is for their individual good, and for the general good. On every abstract question of right their impulses are right. Upon the application of the abstract right to the concrete fact which they see and feel and are affected by, they are swayed by their passions, prejudices, and interests ; their generous impulses are often abused, their better judgments misled ; but their ultimate tendency is right.

If we were to form our opinions of our own national virtue from studying the calendar of crimes committed, the instances of corruption, defalcation, fraud, dishonesty, petulance, hypocrisy, ignorance, humbug, and incapacity, from which we are never exempt, and against which it is prudent to be constantly on our guard, we probably should conclude that the republic lacks the virtue essential to its permanence. But we should err. We should mistake the few for the many, the exceptions for the rule, the parasites upon the body politic for the body itself. The people will not continue to support men for office whom they believe to be wrong ; and if in fact wrong, they will ultimately find it out. The candidate for their suffrages must represent their will and affect the virtues they possess, if he does not himself share them.

The aggregate will of the people is usually better than the average of the intelligence of the individuals composing the people, because they accept the judgment of men wiser than themselves.

Free discussion is the bulwark of liberty. Give truth a

chance to be heard, and in the long run it will make headway. Whatever makes against liberty is false in principle, or in application, and in free discussion truth will contend against it and finally overcome it. In a country of great territorial extent like ours, liable to have erroneous opinions and theories spring up anywhere, free discussion is a most wholesome corrective. The truth hunts down the error, driving it from place to place and localizing it more and more, if it does not wholly exterminate it. If error must exist, it is better to confine it to as few and small and widely separated districts as possible.

Indeed, the great extent and population of our country have proved to a degree not foreseen by the majority of the framers of the Constitution to be a safeguard of our free institutions. History and political philosophy seemed to show that a republican government was unfitted for a country having a large extent of territory, and was adapted only to small districts, like the ancient democracies of Greece, or the cantons of Switzerland. Montesquieu says, "The natural peculiarity of small states is to be governed as a republic, that of medium size by a monarch, that of vast extent by a despot." Mr. Madison combated this suggestion with peculiar felicity in the papers which he contributed to "The Federalist." He distinguished between a democracy and a republic: a democracy he defined to be a society consisting of a small number of citizens who assemble and administer the government in person; a republic consists in the delegation of the powers of the government by all the citizens to a small number elected by the whole. In a democracy, the territory must be small to permit the citizens to assemble in one body. In a republic, since a few are chosen to represent the whole, these few can without much inconvenience make the necessary journey to the meeting place of the assembly. He pointed out, with a clearness which the event has justified, that great extent of country, instead of being an insuperable objection to a republic, would, under the representative system, contribute to its stability and strength. The introduction of railroads, steamboats, and telegraphs has freed this method of government from most of the embarrassments of time and distance. Turbulence may develop in one section

without finding sympathy in another; the local influences that may mislead the people in one state will seldom exist in many states; and the majority, liable to be mistaken in regard to men, will seldom be misled with respect to measures. They will not mistake oppression and tyranny for real advantages.

Again, however bad the individual may be, he desires his government to be just. Thieves and malefactors will vote on the side of virtue when it is presented as an abstract question. As most of our laws are made to meet future cases, the opportunity to vote right is presented before the pressure of the particular case is felt, and hence the majority of our laws are nearly right. The evils we complain of arise from laws made in the presence and under the pressure of some individual case, which excites us, and thus leads us astray.

Of course, the demagogue is the natural product of a democratic government. Our system will not permit him to become a tyrant; it compels him to study and promote the advantage of the people, as the most effective means for his own advantage. If, unhappily, the majority should go astray and attempt to exercise the "tyranny of the majority" for the oppression of any portion of the people,—for it is not probable that they would use it for the oppression of themselves,—it is scarcely conceivable that they could command all the departments of the government at one time; some one department would remain firm, and check the violence of the others.

A condition can be conceived and a hypothetical case stated, in which all safeguards may prove inadequate. Such a case may arise. But we cannot suppose that it will continue without some redress or amelioration after the condition is known, and after the next election unless it is supported by an irresistible army. The government itself may thwart the will of the people. But then the people themselves must turn the governors out. "If," said Mr. Hamilton, "the government should overpass the just bounds of their authority, the people must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify."¹

¹ *The Federalist*, No. 33.

The judicial department in the nation is more permanent. The national judges hold office for life. In many of the states their tenure of office is long. History instructs us that liberty has nothing to fear from a judiciary permanent in its tenure and destitute of political function.

It is only in representative governments that the separation of the legislative, executive, and judicial departments can be complete. In an absolute monarchy, the monarch, or the council he appoints, makes the laws. He or his appointees execute them. He or his judges expound them. Thus every power derives its sourcee from the executive, and must in the nature of things tend to preserve his power and influence. The same is true of an aristocracy. The executive power may be manifold, but the principle of action is the same, and the result the same.

It is not strictly true that in our system the executive, legislative, and judicial functions of the government are absolutely separated into entirely distinct departments. The President, by his power of approval and veto, exercises an influence and often a control over legislation, and thus participates in legislative functions. The Senate participates with the executive in the appointment of officers, and in the making of treaties. The House of Representatives has a practical negative upon treaties which depend upon an appropriation of money or enabling statutes. The House is the accusing body in case of impeachable offenses. The Senate exercises judicial power in the trial of impeachments. The appointment of certain officers may be vested in the courts. But these exceptions do not impair the general effect of the separation of powers, or the good results of the system. The veto power tends to preserve the executive powers from legislative encroachment, to induce care in legislation, and is sometimes a wholesome corrective. The trial of impeachments is a function rarely exercised; it would no doubt be wiser to commit it to a body of more judicial and less partisan methods. The participation of the Senate in appointments to office is injurious to that body, but it is wise to have some power assist the executive, and it is not easy to name any better. The appointment of officers is very sparingly committed to the courts.

The Constitution provides for its own amendment. This is a safeguard against revolution and discontent. There may be defects in the system of government: here is power to remove them. The prerogative is not difficult to use in case of a proper demand for it. It exists, and the people know that if defects in the system continue, it is because they continue to tolerate them. The fact that the Constitution is subject to revision and amendment is a constant warning to those charged with the administration that any system which defeats the will of the people, the people can change. If no such remedy existed, it is probable that discontent would be increased, and small grievances be magnified into justification of rebellion or revolution. Revolution means convulsion and carnage; those who excite it cannot control it; no one knows when the end will come, or what it will be. How much better to secure in peace, and by lawful methods, the reforms suggested by experience, and approved by the voice of more than a majority. It is said that the difficulty of amendment is so great as to be a practical denial of the right. The need cannot be greatly felt so long as the people do not complain. So long as only students and theorists find fault, no amendment should be made.

Our system of national and state governments meets the wants and gratifies the feelings of our people. Herein lies the great guarantee of its strength and success. The people have a voice in the choice of the President and the representatives in Congress. National questions thus are brought sufficiently near to the people to engage their active attention, and give creed and character to the great political parties with which they are pleased to be connected, and into which they divide with a surprising nearness of equality in numbers. State and local affairs are brought very near to them.

The direction of local affairs is usually controlled by state laws, but these are so framed as to give to every local constituency the practical management of its own local government. Each constituency best knows its own wants and can best provide for them. The system of local self-government is practically coeval with the colonization of the country. Townships were the schools in which American democracy was first nur-

tured. The colony bore the impress of the township, the state of the colony, and the nation of the state. The whole system is only the expansion of local self-government. Local self-government is the legacy of colonial times, and has become the inseparable attribute of American civilization. From the beginning it has flourished with the force and vigor of a spontaneous product. It has been cultivated and preserved by constant and universal exercise. The sports and societies of children are not uncommonly regulated by rules, which the older children formulate in a written constitution and by-laws. The instinct of government by written laws is strong and active. And all over the land, from Plymouth Rock to the Golden Gate, the affairs of every road and school district, mining camp, lumber clearing, township, county, village, and city are locally self-governed. Not infrequently has it happened that the march of emigration has pushed beyond the frontier posts of any state or territorial organization. There the governing genius of our people has asserted itself, and without waiting for any sanction from lawful authority, has organized governments and administered justice. Their methods may have been rude and their justice speedy, but the righteousness of their judgments has seldom been challenged. When the authority to organize a government reaches these pioneers in the due course of events, they usually are ready and competent to exercise it.

The general government might, by its general laws, and system of bureaus, as in France, manage all local affairs, if such method were permissible under our system; but it is obvious that it is much better for the people to take the direction of their local affairs than for the general government to take it. In the one case, the people think and act for themselves; in the other, the government thinks and acts for them,—a fact which may accord in some degree with the difference between the American and French character, and account for it.

Passing to state affairs,—if the people of the state of Maine desire to prohibit the sale of intoxicating liquors, there is no good reason why the people of any other state should object; or why the people of Maine should move the whole nation in order to establish a domestic regulation. When such matters

are confined to the states, the people of every state can do as the majority think best. Moreover, every citizen of the state is encouraged to take such action as he thinks proper. He is free from the depressing conviction that unless he can move the whole nation, his efforts are lost. If the laws permit each town or village to adopt or revise its own regulations respecting schools, public improvements, and other matters of local government, a wide field is open to persons who would be dumb if they had to make the state or nation hear in order to be heeded. In American communities nearly every man, however feeble in intelligence or influence, sometimes casts his thoughts beyond himself and considers what society ought to do. Our system of government encourages all to do this. More zeal than wisdom may be expended, but the desire to benefit mankind is a noble one, and the person who is moved by it is the happier for the privilege. Society is better as the result of the discussion. Even fools and fanatics sport with some foundation questions of truth, and while they rant, wise men think, and the outcome is towards the direction of the wisest thought. The sense of liberty to act as one thinks to be right, of the power to vote in the same way, of the hope to accomplish some good, is a positive happiness; and that government builds wisely for itself and its people which secures and encourages this source of happiness.

The expenses of government are usually less, the nearer the expenditure of money is kept within the control of those who provide it. If those who administer are under the eyes of those who pay the cost of administration, abuses will be less, and exposure of abuse more certain. A dollar accomplishes less in Washington than in our state capital, less in our state capital than under the charge of our local government. The further power is removed from its source, the more extravagant and irresponsible it becomes.

Given local self-government, it matters little how vast a territory the nation embraces. Texas has little in common with New York, except her equal desire for the national prosperity, her claim for the equal benefit of the national protection and instrumentalities, and her equal obedience to the national

demands and authority. Subject alike to the national Constitution, each may pursue in her own way her best methods of domestic happiness and prosperity, without injuring the other, or exciting her jealousy or animosity. If Mexican invasion should threaten to pass the Rio Grande, or English invasion the St. Lawrence, the remoter state would be proud to guard the threatened bank of her sister's river.

Any statesman who conceives the idea of superseding the state governments and extending the national government over them takes small account of the force of the trait of self-government in our people. It is the dominant principle of our system. It finds its greatest activity in local government, largely, no doubt, because the majority of people cannot well see beyond the local horizon. The struggle of the nation to gain and maintain its place was prolonged because the people feared that the local government, which they had and understood, was in danger from the new and greater government, which they did not well understand, and therefore feared. Gradually this fear was dispelled. So many states and so many people of kindred race and purpose really formed a nation before its existence was declared, and gradually the people felt and saw the good the national government performed. Their vision expanded and took in the larger horizon. They saw that their local governments rested upon a surer base with the national guarantees.

These guarantees are plainly expressed in the Constitution, and when time had inspired confidence in them, they added immensely to the strength of our system. Thus, "the United States shall guarantee to every state a republican form of government" is not a mere phrase. Suppose a foreign power should invade a state and overthrow its government. The United States would expel the invader and restore republican government. Should the people of the state change their government to a monarchy, the United States would interpose and restore the republican form of government. Republican government in every state is essential to the federal system; if that system is changed by any state, it is threatened throughout. The guarantee is essential to all the states as well as to any one of them.

Suppose, as occurred in Rhode Island in 1842, two governments contend for supremacy, each claiming to be legitimate. The result is anarchy and civil war unless one or the other be promptly suppressed. In the case cited the recognition of one government by the President effectually suppressed the other.

The ratification of the Constitution was opposed by many upon the ground that the new government was made to destroy the states and deprive the people of power. Mr. Madison, in the forty-sixth number of "The Federalist," met this objection in his inimitable way. "Either," he said, "the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the state governments, which will be supported by the people." This reasoning is as true now as it was a hundred years ago. If the federal government should lose the confidence of the people, it could not long exist. In the late rebellion, but for that confidence, it would have ended just as the old confederacy ended.

To quote Montesquieu again: "Government is like all other things in the world: to preserve it, it must be loved. No one has ever heard it said that kings do not love monarchy, or that despots hate despotism." Manifestly also a republic, to be securely grounded, must engage the affection and support of the people by whom and for whom it exists.

A constitution must be framed with reference to the people to be governed. It was the felicity of the American people that they were trained in republican government from their infancy.

The Mexican, Central American, and South American republics have constitutions somewhat similar to ours. But they do not operate with the energy, efficiency, tranquillity, and good results that we experience. The difference is not in the form and plan of their constitutions, but in the people. They have not yet attained the education, poise, elevation, virtue, and habits which inspire them to coöperate to make their govern-

ment as good as possible, and to repose with confidence upon its stability and justice. Hence revolts, rebellions, or revolutions need scarcely surprise us. No doubt these are educators, cruel and wasteful though they may be. Through them, and in spite of them, the people will gradually work their way toward the capacity to govern themselves better.

A government influences the people, and they in turn the government. No government within the range of civilization can escape the influences of the civilization of the age. Much less so now, when steam and electricity annihilate the barriers of time and distance.

Our government exists so near to the people that the just complaint of the feeblest citizen can be heard. The people appeal, if need be, to the government without fear of rebuke, and with manly confidence. The government adapts itself to the people, and the people to *their* government.

The stability and cohesion of our government have been aided by physical causes peculiar to our country. The great mountain ranges and intervening rivers run from north to south. They have been aptly called "nature's eternal ligaments," binding the frozen North to the sunny South. The rivers of the country naturally bind our people together, and the steamboat has made the bond still stronger. The highways, post-roads, and canals have followed the valleys and the rivers. Had these mountain ranges run from east to west, the late civil war, as has been suggested, might have found an ally in nature that would have given success and permanency to the attempted division. The railroads and telegraphs which cross the mountains came too late to avert the civil war, but they were aids to its speedier suppression, and now they bind the new Union together with stronger cords than ever before.

The "Spirit of Nationality" is a bond of union which strengthens as the nation grows greater. The physical ligaments of our country, both natural and artificial, contribute much to this spirit. Great mountain ranges and rivers separate people. This separation is confirmed if different languages, governments, institutions, and customs exist within the different states. The Pyrenees separate France from Spain;

the Alps, France from Italy, and Italy from Switzerland. The Rhine formerly marked the line between the French and German races. The Rio Grande separates us from the Spanish-speaking people of Mexico. But the difference in race, customs, institutions, and language is the real boundary.

Canada did not unite with us in the Revolution because we had no real kinship or sympathy with that people, nor they with us. When the English tongue and customs shall have superseded the French throughout the Dominion, union with us will not be difficult. It was because the people of the colonies and states on this continent had so much in common that they came together in their desire and effort for independence, and afterwards in making a government for the nation which in fact had long been forming. The spirit of nationality brought and kept them together. Witness the German and Austrian empires; united Italy; the kingdom of Spain; the confederation of Switzerland; England, Scotland, and Wales. The separate parts came and remain together because their people have in some degree a natural affinity. In our country the spirit of nationality is strengthened by every event of our history. Even the soldiers who fought in the opposing armies in the civil war now come together in the same societies and associations. The attraction of participation in the war overcomes the antagonism arising from opposing sides. Surely, the nation engages the love of its people.

Again, its magnitude and strength, perfection of organization, and command of resources seem to forbid even attempt at destruction. Who shall contend against it?

Lessons drawn from history need not excite alarm for its perpetuity. Indeed, history marks a new era for mankind in the records of the deliverance of the people from the bondage of the usurped tyranny of rulers. Not a mere single instance, like that of the chosen people of Israel; not here and there, as in the small city states of ancient Greece; not deliverance for the patrician few and serfdom for the plebeian many, as in republican Rome; not merely where the sea or the mountains become the allies of liberty, as in the Netherlands or in Switzerland,—but over continents and for the masses of all the people.

In the New World liberty embraces the hemisphere ; in the Old it marches eastward from the islands of the west and from along the borders of the ocean. Conquering and to conquer under the gospel banner of peace on earth and goodwill toward men, it will enter and abide wherever mankind is prepared to receive it. The question of the future is not how to acquire liberty, but how to make the wisest and best use of it.

The invention of printing, the wide diffusion of education, and the intercommunication of mankind afford a guarantee of good government in some form. The long delayed day of the equality of human rights has dawned. The world will never recede into the intellectual darkness of the Middle Ages. The people now know that governments are formed for their benefit, and as they have the power, they will not consent to lose it. The science of government is better understood than ever before. The value of a good constitution is known. Our people are not likely to lose the wisdom they have gained unless their vices destroy their physical and mental vigor. There is reason to hope that we shall gradually improve our government. Whatever is a true principle in justice in one country is true in all,—on the banks of the Danube and the Ganges no less than on the Hudson,—and the students in one country are students of every other. Truth, wherever discovered, can no longer be confined to one section, one race, language, or continent, but must ultimately pervade all civilized peoples and be their common property. The wisdom of the wisest becomes the common property of all. Steam and electricity bring the uttermost ends of the world together ; the better mankind know each other, the wiser and better they become.

Our great physical strength and our isolated position protect us. Our sense of justice should afford us a still stronger protection. Our vast expanse of territory renders sectional difficulties more sectional and less dangerous. State lines are only significant as indicating the limits of local jurisdiction. The same justice and substantially the same laws exist upon both sides of these lines. Our laws are, or are to be, the reflex of the popular will, and the aggregate popular will demands equal and exact justice. The era of great political leaders has passed

away. The people have been leveled up nearer the leaders. The press, the platform, and a broader individual horizon displace the leaders. No newspaper can be great that is a mere party organ. Careful students of our economic conditions are increasing in numbers and influence. The national habit of solving the problems of political economy by party platforms and a majority vote would be ridiculous, were it not for the fact that preceding and following the platforms there is universal discussion ; by such means the facts and arguments which are ascertained and adduced by the learned and thoughtful are made familiar to great multitudes of people.

Political students and writers who aspire to instruct the people spurn the imputation that they are bound by the fetters of party. They seek to lead the people, not a party, to true conceptions of political duty and national welfare. Nothing is sadder in our unwritten political history than the usual fate of the unfit political aspirant for public office and its emoluments. The pity of it is that we are attracted by the one who attains substantial success, and learn so little from the hundreds who wreck their lives. These men are usually of good native capacity, but of defective education and moral strength. In political life a transient success is usually followed by a lifetime of failure. Our history is yet young, but if the lists of ambitious ruined and forgotten aspirants for political distinction could be compiled, their bulk would be huge and their warning solemn. Still there is reason to believe that we are slowly and steadily multiplying the real elements of a solid, genuine, and intelligent public life. The weak and fickle, the sham and pretentious, the dishonest and knavish may never be less, but the capable and genuine will steadily increase in numbers and influence. Ten righteous men would have saved Sodom. The like rule holds good yet. Great is the saving power to the state of its capable and righteous men.

Above all, the people have come to love this system of government. They have tested it, prospered under it, approve it, and believe in it. True, the national Constitution is old. But the outlines of the system are clear, and have been made clearer by time and customary use. The enumeration of powers without

definition leaves their definition and construction to be made as occasion requires. Thus it has been and still is practicable to define and construe them so as to make them adequate to the national needs. And hence the Constitution, though fixed in its text, is sufficiently flexible in its operation. This flexibility of operation is the secret of its perpetuity. Time brings no infirmity, and change no unfitness.¹

A resemblance in this respect may be traced, not irreverently, between the Constitution and the Holy Bible. The Bible is old. Yet every one who admits its authority finds it fitted to his needs. To the believer it speaks the living truth. He finds in it the verities and consolation he seeks. The record is indeed closed, but he believes it contains enough.

¹ The status of Porto Rico, the Philippines, and of most of the territorial acquisitions of the United States since the formation of the Union has been mainly determined in actions brought by merchants to recover back the duties imposed upon merchandise imported from those possessions into the United States, or exported from the United States into them. The questions arose, 1. Whether the United States could acquire such territories without thereby instantly incorporating them and their people into itself as part of its body corporate and politic, and thus extending the Constitution and all its rights and privileges to the newly subject peoples? The answer was, Yes.

2. If not so incorporated, what is their status? Answer. Places and people, both subject to the jurisdiction of the United States, but not part thereof.

3. Does the Constitution extend to them of its own vigor? Answer. No. Laws similar to constitutional provisions may be enacted for them, but the Constitution is self-extending to new states only.

4. Does the Constitution restrict our powers of government over them? Answer. Not in the particulars in which its restrictions are specially in favor of the rights reserved to the states and the people, unless the treaty of cession so requires, but the restrictions which are of universal application do apply. Statesmanship wisely tempered judicial interpretation in reaching these conclusions, since admission to full partnership should await fitness and practicability. *DeLima v. Bidwell*, 182 U. S. 1; *Dooley v. United States*. ib. 222; *Downes v. Bidwell*, ib. 245; *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, 195 U. S. 138.

CHAPTER XVIII.

REAL DANGERS NOT IN THE SYSTEM, BUT IN THE PEOPLE.—APPREHENSIONS.—REMEDIES.

THE ship of state is now upon the second century of its course. It has passed thus far safely along, despite the rocks and shoals, false lights and storms, enemies and pirates, that threatened destruction, and despite the false prophets, timid friends, rash advisers, and pessimists who predicted or courted it. Why has it done so? Simply because it was fitted and worthy to survive, if properly managed. Now that we understand the business better, know the course, have removed some of the obstructions, have beaconed others, and in various ways have strengthened and improved the ship, we may reasonably expect good sailing. If there are dangers ahead, they will not arise from the faults of the system, but from the faults of the people. We need fear only ourselves.

Incompetency, folly, and madness may destroy any human institution. Mere local spasms and convulsions will be suppressed by the greater strength of the larger and more sober portions of the country. The majority must be disaffected in order that any attempted revolutions shall achieve success. Foreign hostility or injustice would readily unite our people in foreign war. If we were feeble, we might be ruined. But we are strong, and have the ability to take care of ourselves, and to inspire an enemy with prudence. An ignorant or foolish majority may ask of the government more than the government ought to give them, and may control the government. But it cannot be for long. Let wisdom and intelligence take thought, and they will take power.

Thus the spoliation of private property is a possible danger. Democracy, it is said, tends to crush the wealthy and intelligent

classes. The redistribution of property and legal extortion from the wealthy have great attractions for the desperately poor. Universal suffrage has placed power in the hands of the poor. Organized and united poverty could outvote wealth, and dictate the laws, and thus bring about the tyranny of the majority. Wealth and intelligence are vigilant and powerful,— vastly more powerful in proportion to numbers than ignorance and poverty. If, while they can make the choice, the alternative is presented between suffering the injustice of the mob and reposing in the tranquillity of a monarchy or a dictatorship, doubtless the latter would be preferred.

If so, then the hopes of the poor depend upon even-handed justice ; if they should abuse their power and persist in its abuse, they would in the end lose their liberties, or some part of them. The rights of property must be respected ; intelligence and wealth will combine for self-preservation. Such a combination in this country would sooner or later triumph over the anarchy, confusion, and distractions of the mob. Knowledge is power, and knowledge combined with wealth — wealth embracing in this country every man who has a house and lot, or some accumulation as the result of his industry and economy — would restore peace and good order, though liberty might be largely sacrificed. Wealth itself can do much to avert any such evil by its fairness in bearing its just share of the burdens of government. This is one of the lessons wealth must learn. Where universal suffrage abounds, wealth cannot afford to oppress the poor in order to increase itself. The hopes of the rich also depend upon even-handed justice. “Thou shalt not steal” embraces in spirit every larceny, whether committed by the subtlety of the rich, or the extortion of the poor.

Against the happening of any convulsions arising from the attempt of the poor to extort from the rich, and from the rich oppressing the poor, we have, in addition to the interests of both classes, the American respect for law and justice. Poverty is hard, but it is the school of virtue for large masses of the people, and there is little reason to suppose that any convulsions will rise to proportions above a riot. Americans usually suppress riots with promptness. When the exigency requires

it, authority to use powder and ball is generally given, and in such cases no blank cartridges are used, and the conflict is short and the ascendancy of authority rapid and complete. There seems to be a real kindness in the very cruelty of instant vigor. Every convulsion ought to teach both government and people practical wisdom. If it have its origin in a wrong done by the people's government, the instruction of the people must lead to the correction of the wrong. The only common ground that all men and classes of men can stand together upon is that of fair play and no cheating. The individual might practice otherwise for himself if he had the opportunity, but in state affairs only a few have the opportunity, and the masses seldom can agree upon any other thing than that which equal justice requires. From the necessity of the case, the strength which is found in union can only be obtained by conforming to the terms which make union possible.

Notwithstanding all our selfishness, our people are virtuous to a degree never surpassed in any great country in any age. This is an age of inquiry, free discussion, and criticism ; the dogmas of theologians may have lost something of respect and force, but practical and personal righteousness in daily life was never so abounding. Witness the vast circulation of religious and devotional books and publications ; witness the churches, schools, societies for the diffusion of knowledge, the promotion of temperance, the relief of suffering, the care of the unfortunate, the help of the poor. Witness also that private benevolence which seeks happiness in doing good. Every one commends it. Independently of taxation, every man and woman, whose means afford the privilege, unites with others in various organized efforts to help the unfortunate. When we lose sight of the good in contemplation of the bad, we forget that the good is the rule and the bad the exception, and that the exceptional always more strongly arrests attention. There is little reason to fear that the party of wickedness and lawlessness will ever outnumber the party of virtue, decency, and order. Bad men may deceive, mistakes may be made, but the evil will be temporary, and will be reformed in obedience to the right feeling of the greater numbers of our people.

The great strain will come when our population shall have so increased that the masses cannot procure necessary food and clothing. That is a distant day, but there is no doubt that the time will come when our population will press upon the means of subsistence and be limited by it. Our population is destined to be great. In a hundred and fifteen years it has grown from three to, say, eighty millions. We have, say, fifteen hundred millions of acres of land, good and poor, and some of it very poor. If three acres could be made to feed and clothe one person, we could subsist five hundred millions of people,—about seven times our present number. War, pestilence, and famine, in other ages and countries, have reduced the number who eat to the supply of food to be eaten. Poverty of the food supply provokes war, pestilence, and famine. In America the conditions opposed to the waste of human life from any of these causes are powerful. Our isolation as well as our strength and martial qualities protect us from foreign wars; our strength and respect for law protect us from domestic strife. Our sanitary regulations, undertaken by the national, state, and municipal authorities, protect us in a high degree from pestilence and infectious diseases, and with advanced medical skill go far to prolong human life. The teachings and practice of Christianity in modern times tend to the preservation of every human life, however miserable. Passing by the ethical question involved, and regarding the question solely in the interests of political economy, it would be better with men, as with animals and plants, that only the fittest should survive; but the humanity of the age embraces all in its benevolence, and spends possibly more time, money, and sympathy upon the broken human hulks that lie stranded upon the shores of existence than upon those whose lives are worth preserving.

The favorable conditions for the natural increase of our population, the swarms of the surplus of other peoples, must inevitably swell our numbers to the utmost limit of our means to afford subsistence. The fields of productive industry must become more and more crowded, and there will be an ever increasing throng of those who will want to enter, and yet be kept out. The wages of those who work will be less, the multitude

of those who never can or will work will be greater. The rich and poor will be side by side, and yet between them a great gulf fixed.

What can be done with the coming swarms of people, who cannot find work enough or obtain pay enough to afford them a decent subsistence? Such a people, it is said, will listen to the demagogue, the adventurer, the charlatan, whoever will promise them the easiest help. The era of quacks will have arrived. Government may have a standing army to put them down, to shoot them on the streets, or force them to slink to their hovels and die. Can a popular government meet such a strain? The men who will swarm in revolts and mobs have votes, and their power to vote inevitably tends to weaken the power that should keep them in order. Will not the strong man mount to power and found a throne? Will not the order of despotism be preferred to the weakness and anarchy of universal suffrage? To say that we shall succumb is to say that we shall degenerate; and yet the forces which work for the elevation of mankind were never more potent and progressive than now. It is base pessimism that loses courage and hope.

A prudent care of our public lands would go far to postpone and avoid such a calamity. None but the actual settler should be permitted to acquire them. There should be no monopoly of vast tracts. The landlord system of Europe should take no root here. Tenancy of land where one owns and another works is a species of thralldom unsuited to the genius of a free people. It cannot be entirely abolished, but the government should not extend the system. Our lands are too poor to support both landlord and tenant.

Great inventions mark the nineteenth century. Steam and machinery seem to do the work that otherwise would employ idle hands. But machinery, while encroaching upon manual labor in nearly every single field, is constantly multiplying the number of fields. Thousands bring only their hands into the markets of the world. Alas for the man who has only human muscles to offer where machinery does so much. The places for him in the great centres of industry are changing and closing, and his lot is hard. Machinery drives him to his mother

earth,— his first and final refuge. That is his natural place. God appointed him to it.

It is a significant fact that neither invention nor machinery can produce the materials for food or clothing. These now, as from the beginning of the world, must come from the animal and vegetable kingdoms,— that is, from growth. Seedtime and harvest, the eternal rejuvenescence of Nature and the eternal ripening of her fruits, are the necessary conditions of human subsistence. The power given us by the Almighty to increase the productive capacity of earth, water, and air has thus far been imperfectly used. To make barren land productive, to make good land more productive, to increase the fish production of the rivers and seas, to multiply the food-giving fowls of the air, afford opportunities and resources of unknown limit. Scientific investigators assert that all the ingredients of plant-food, except such as the atmosphere affords, exist in inexhaustible supply in the minerals of the earth. Labor only needs intelligent direction to extract and apply them. We may reasonably hope that the demand for the best intelligence will be met. Fortunate will it be if it can be said, There is no strip of earth so barren that intelligent toil may not extract from it some means of subsistence. We can foresee a possible source of danger, but we cannot doubt that the expanding intelligence, humanity, and ingenuity of man will cope with it. Voluntary idleness will not be encouraged by free gifts, but the fields of useful labor, for those who can perform it, will be sought and found. The existing means of transportation enables the surplus of one part of the earth to make good the deficiency of another. It encourages production in new and distant colonies. The continent of Africa will yet be made to contribute her share to the subsistence of the world's population. It can scarcely be doubted that the productiveness of the earth can be increased fifty-fold under the stimulus of necessity directed by the highest intelligence aided by the most appropriate means. What problems are to be solved in this direction can only be known when the need for their solution presses. Wisdom will not perish with our generation, and those who come after us will have the strength their day requires.

Universal suffrage has its evils, but it has its merits also. A government which seeks to maintain and protect the equality of rights of all men can best do it by the most liberal extension of the privilege of suffrage. The right to vote and the power of the vote afford the most effective shield which one class has against the oppression of another. The minority to-day may be the majority to-morrow, and government respects possible as well as actual power. Of course many are too ignorant to vote intelligently, and become mere tools in the hands of others, and too many make merchandise of their votes. But the good results must be weighed against the bad, and the balance clearly is on the side of justice to those who, but for their voting power, would be too often the objects of injustice and too weak to obtain redress. The privilege of suffrage is an educator; the education may not be thorough, but it is better than none. It gives the voter an increase of self-respect, and attaches him to the government of which he feels he is a part. It is true that universal suffrage creates the professional politician, whose trade it is to sell nominations and buy votes. But this low intriguer is known to be such. He is a mercenary go-between, who is usually content if he can get money and keep out of jail. When public virtue is aroused, it puts him down. We must not destroy our useful institutions because vermin infest them, but must exterminate the pests.

The great wealth of corporations and of a few individuals is supposed to threaten public justice and official integrity by resort to bribery and corruption. This risk we must take and struggle against it. Virtue will lose its qualities when it has no opportunity or incentive to overcome evil. Public vengeance as well as legal punishment are sure to be visited upon the official who is detected in taking bribes.

Great corporations wisely governed and honestly operated are public benefactors. They place the facilities which only great wealth can command at the service of any one upon his payment of comparatively a small sum. The result is, that the individual of moderate means can by the payment of small sums secure for his personal use and convenience the advantages which the wealth of others afford. Great fortunes are of

no especial use to their owners, whether corporations or individuals; they must put them to use in the employment of labor, and the purchase of its productions. The methods of the age no longer permit the rich to have an excess of comfort and luxury proportional to their excess of wealth. Thus, for a few cents per mile, I can bring to my service in my personal travel all the speed and safety and comfort which a great railroad corporation can render. The owners of the railroad can do no better. I do not need to own the railroad, I only need to own the few cents. This illustration can be expanded to embrace a thousand other instances, and should make us thankful that, though we do not possess wealth, we can so readily and cheaply employ all we reasonably need of its conveniences. The people through the state make the corporations, and, as has been already shown, have the power so to regulate and supervise them as to enjoy their benefits and prevent their abuses. Many economic questions, which under former conditions did not exist, or, if existing, were resolved in favor of the individual, now present themselves under the light of new conditions. Among these are the following:—

Shall the government take the ownership and control of the railroads, telegraphs, coal mines, and such other necessities of life and great instrumentalities of modern enterprise and industrialism as nearly affect the body of the people? The argument in the affirmative is, the public interests involved are so great that they become governmental in their nature, and to permit them to remain in individual hands is to make the public welfare the subject of private speculation, monopoly, and abuse; that, while vested private rights should be protected by law, yet, when they have attained such magnitude as to control or largely affect the public welfare, the public should assert its governmental function and take to itself the property and its control, rendering to the individual just compensation for its value as private property, exclusive of its value as a governmental instrument or factor, since neither of these can be the rightful subject of private ownership.

The opposing argument, resting upon expediency rather than right, asserts that government should confine itself to strictly

governmental matters, that is, the protection of the people in their rights, not the management of their industrial business or the supply of their physical needs; that the law can prohibit and punish extortion, and regulate corporate franchises and business, and even such private business as from its nature, situation, or magnitude becomes a monopoly in the supply of the public needs; that the public management of such enterprises in a popular government would fall into the hands of dishonest and incompetent men, or be perverted to the success of political parties, and thus the remedy would be worse than the disease.

Underlying this question is the doubt of the fitness of a popular government to undertake and manage such enterprises. Rotation in office is an inseparable incident of elective power. In purely governmental matters, not involving the ownership and management of industrial enterprises and plants, the constitutional chart is the guide of the officers in charge, and the evils of rotation in office are minimized by the routine established under the constitutional system. But how to operate a railroad, a sugar refinery, or other like enterprise, is a business and not a governmental matter, and of course requires skill and great business ability, quite different from political skill or familiarity with governmental habits. To secure the best results in our political system, its natural qualities and limitations should be considered, and care should be taken not to embark in operations for which it is unfitted, and not to assume control where it is not sure to command competent service, or long retain it. Rashness, inexperience, and low integrity would be disastrous, yet the possessors of these qualities would seek and perhaps too readily obtain the field for their exercise. A popular government should learn its weak points, and cultivate the self-denial that suppresses their display and danger.

How far is the individual the sovereign dictator of the wages of the workmen in his industrial enterprise, which, under the favor of the government and his own far-sighted management, has drawn to dependence upon it, and upon his fairness, vast multitudes of workmen? Can he deny their title to his fair-

ness when he has practically disabled them from livelihood without it? And, if this is so, then is not the employer's denial of fairness an offense to the public to be redressed by it? We have already seen that the government cannot bargain away rights governmental in their nature.¹ When private rights attain to governmental importance and influence, it seems to be clear that they have absorbed something that belongs to the government. Unless the government can protect its part in the mixture, it is something less than sovereign.

But when we pass to the manufacturing and other enterprises which are of such a character that no one need pay tribute to them in any public interest, not even in his own except upon his free choice, we have clearly passed outside of the proper field of governmental ownership or management. The subject is too large to be disposed of in a few words, but it may be assumed that the government is unwise which takes the shiftless man into its favor, and places the thrifty man under restraint. In the punishment of crime, the individual should resort to the state and not trust to himself; but in the pursuit of an honest livelihood, the more he is allowed to depend upon the state, and the less upon himself, the more both the state and himself are lapsing into degenerates.

The settlement of all these questions will be reached by the evolution of practicable measures of justice through the experimental conflict between the old and the new ideas, and between public and private rights. Legislation has already broached the subject. Its unjust enactments will be consumed by their repeal or amendment, or in the fire of the judicial crucible; but out of the seething agitation it cannot be doubted that the twentieth century will make steady progress toward a righteous solution. Every just measure for the removal of just discontent is a new guarantee for the stability of the state. Every just measure that is denied or circumvented weakens that stability.

One great bulwark of the people against the danger suggested, as also against so many others, is the judiciary. Our people will not tolerate a corrupt or incapable judge. The

¹ *Stone v. Mississippi*, 101 U. S. 814.

public sentiment upon this question is and always has been right.

The influx of immigration is great, and fears are expressed that the quality of our population will be reduced, and the danger of the subversion of our free institutions increased. Some of the immigrants, it may be, are fit instruments of mischief, if leaders and opportunity offer. The fate of those who perished on the scaffold at Chicago by the doom of American justice warns their sympathizers to avoid their offense. But we should not judge the many by the few. The great majority of immigrants are honest people, who come hither to improve their fortunes by honest industry. They cannot escape the influence of our people, government, and institutions, and few of them have any desire to do so. Their children born here will be native citizens. Children are imitative beings, and cannot avoid acquiring our habits and ideas. We reject the Chinese because our country does not assimilate them with our own people. The English-speaking and Teutonic races have similar race instincts, and their children resume in America, upon association with each other and with the same surroundings, the indistinguishable characteristics of their remote common ancestry. We need not fear the children of these immigrants; they will be Americans all, bound to the country by precisely the same ties that bound Andrew Jackson, Chester Allan Arthur, and Philip H. Sheridan. With every passing year, the proportion of native to foreign born increases. Death constantly diminishes the number of foreigners, and birth increases the number of natives. Death, birth, and time will surely send the foreigners far to the rear and the natives far to the front. We need not fear the issue when the three most constant and potent factors of nature are with the native and against the foreigner.

Some good people fear, or seem to fear, church or religious domination in the interest of one church to the downfall of our liberties. Nothing is more natural than religious jealousy. The ignorant believer of almost any religious creed is apt to be bigoted and intolerant. He believes he is right, and by consequence that others are wrong, and he cannot understand why they persist in their errors. He is prompt to impute

motives, and thus easily becomes jealous of danger or injury when none is intended. Almost every American influence opposes the revival of religious hostilities. Church and state are divorced. This is not a mere accident of our civilization and forms of government. It is the recognition of the fundamental distinction between things eternal and spiritual and things temporal and worldly. If we regard both church and state as human institutions, then the divorce rests upon the proper division of labor, and the separation of distinct contrivances for the welfare of mankind. Both the statesman and the divine know full well that each institution is the more easily and efficiently operated if it remains unembarrassed by any entangling relations with the other.

The statesman knows that liberty in matters of religious faith and worship strengthens the state. The divine knows that the protection and confidence of the state afford the church the amplest opportunity to exert its moral and spiritual influence. "My kingdom is not of this world" was the declaration of the author and finisher of the Christian faith, and "Render unto Cæsar the things that are Cæsar's" was his command. Hence separation from the worldly kingdom, but submission to its just requirements, would seem to be the indisputable law of the Christian churches. It is true that history and the existing practice in other lands afford examples of the union of church and state, and argument is not wanting to urge its propriety and righteousness.

In ages of intellectual darkness and of personal bondage, when the church alone held the remains of liberty, learning, and humanity, it did well to assume authority sufficient to soften the severity of rulers and check the turbulence of men. It was so far a human institution that it sought to keep this authority. Whatever may be the rule in other countries, the right of the church to bear civil power cannot be admitted in this. A revolution must first occur in the sentiments of the people respecting the true function of the church as an agency for the welfare of mankind.

There may be, here and there, symptoms of resistance to universal liberty in religious faith and worship, and to the divorce

between church and state. The voice of the sixteenth century may claim a hearing in the twentieth. Old phrases may revive and be repeated ; they are the lament of a lost dominion. No church can prevent its American communion from perceiving that when it seeks to dictate to the state, or usurp control over it, it abandons its proper functions. Every native American acquires something of an American political education. The wise church will not venture to dictate the political action of its members, so long as it is morally permissible. The attempt would result in the triumph of the American spirit of independence, and the return of the church to its appropriate duties.

Every church, whether Catholic, Protestant, Hebrew, or Pantheistic, feels the need, not of the support, but of the protection, of the government. It has long been accorded. Any withdrawal of it would shock the universal sentiment of justice. Any unfriendly assault by the government upon any one church would be construed as the right to assault any and all other churches. The government arrays itself against no church. It suppresses the polygamous practices of the Mormons, but this is not war against the church, but against the offenders within it. It does not permit one to offend against society because his church tolerates or invites it. The liberty and security of any one church depend upon the civil equality of all of them.

The decay of public virtue will result in the ruin of any state. This is our greatest danger. If it shall come, its approaches will be slow and insidious, resulting in a real revolution, without convulsion or rebellion, without any special event to mark its beginning and progress, but, like the dry rot in oaken timber, destroying the quality before attacking the outward form, and leaving worthlessness where worthiness is most needed. Against such a danger a pure religion is the mightiest bulwark. Philosophy offers no substitute, for the reason that not one tenth of one per centum of the people have the mental and moral qualities to enable them to climb the heights of philosophical excellence and stay there. Education is some help to virtue, certainly, if the education is in virtue, but the education that is diffused among the masses of the people is more of a business utility than a moral help. Men

are and ever will be anxious about the future life. Science and historical criticism may overthrow or confirm the faith of the few; it will never touch that of the many. Evil example is the potent cause of the increase of irreligion. "Because iniquity shall abound, the love of many shall wax cold." A decline in the vigor and unselfishness of the churches will contribute immensely to the decay of public virtue. There is some danger that the churches will, from motives of policy, from dependence upon the support of the people, from shrinking back from a contest with the particulars of immorality, fall somewhat short of their high calling. Does the pulpit never falter in the presence of the pew? Does it never shrink from following its convictions respecting the accustomed sins of its people? Does it never avoid its duty with regard to the particulars of evil at the gate of its own sanctuary, and find safety and repose in denunciation of the alleged sins of other times, places, and people? If so, it is the fault of the people who will have it so.

It is of immense importance to the state that the churches of every sect and denomination should suffer no loss of their power and influence in leading the people to love virtue, and to try to live virtuously despite temptations, and despite continual shortcomings. They are the natural leaders and teachers in the methods of peace, goodwill, and charity. Every one blesses the consolers of the afflicted, the comforters of those ready to perish, the true pastors and benefactors of the people. The real hope of the churches is in the gracious favor of the Almighty One. This the changes in civil order cannot reach, and hence cannot touch the church in its true sphere.

We may reasonably hope that the opportunity for the usefulness of the churches will increase and be improved. The trend of Christian people, as they increase in intelligence, is toward Christian unity and practical Christianity. As the age of religious wars and persecutions recedes, the inherited antagonisms between rival sects slowly fade away. As all parts of the earth contribute to the common stock of wisdom, ignorant prejudice is more and more exposed and disarmed. Hence the churches must come nearer and nearer together in things essen-

tial, as the procession of the generations moves along. It will naturally follow that they will more and more coöperate in beneficent labor and influence. Thus their usefulness will be greater, the antagonism to them less, and the occasion for disparaging criticism less. Under their lead and ministration, why should not public and private virtue have all the incentive, support, and nourishment which a pure and holy religion is so potent to afford? Why should not public and private sins receive that just and dispassionate exposure and rebuke which they deserve, and which holy men can so fitly administer?

Corresponding with the influence of religion, other useful agencies will abound and coöperate to improve and help mankind. The tone of the press, the character of official as well as of private utterances, will be influenced by the standard of virtue among the people. Civilization will improve or degenerate accordingly. The assaults upon religion will be harmless or harmful as its works and influence are or are not practically powerful for good.

It is in the purifying influence of religion — for nothing else so brings our spiritual aspirations to our improvement — that we must rest our hope for the prevalence and continuance of that virtue without which our Constitution and forms of government will prove to be skeletons, unanimated by any vital principle of usefulness. After all, the laws which a people frame are a good test of their standard of virtue. The legislation of the several states abounds in crude and impracticable enactment, — efforts to accomplish by legislation results outside its proper scope. Although these efforts reveal a defective knowledge of the science of legislation, they also show the progress of the people in virtue, and their constant desire to elevate the standards of public and private morality.

It is said that the tone of the public press is lowering, and that this indicates a degenerating public. The daily press is of many kinds and shades. But, taking the worst, we should still discriminate between the matter it publishes and the measures it advocates. Tested by the latter, the standard of public virtue was never higher. In the respectable press, and especially in the periodicals in which public questions are dis-

cussed, the tone and standard are in the main irreproachable. They, too, but minister to the public demand. Publications openly immoral are under the ban of the law. The press is not a witness against but in favor of the rigidity of public virtue.

There is the inordinate greed for money. It cannot be altogether repressed, but its intensity will be mitigated. In a new and developing people,—in a land recently rescued from its primeval savagery,—the acquisition of wealth is its principal attraction to the man of the world. It will remain so until the generations which achieved this wealth have used some part of it in establishing institutions for the development and culture of nobler ambitions and pursuits. We have entered upon the latter stage, but it takes time to perfect and mature it, to temper and in some degree replace the sordid worship of money with worthier ideals and aspirations. We shall make progress against this mammon.

And so we have a well-grounded hope—it would be injurious if we had more—that, under favor of Almighty God, our Constitution is and will remain an inestimable blessing. It secures the inalienable rights of all men within its jurisdiction against the government itself, and against any and all masses of men, here or anywhere. It fixes these inalienable rights as impassable limits to the ebb and flow of the popular tide. Within these limits, let the tide rise and fall and beat and surge. Agitation is wholesome. Perfect quiet would be stagnation. The limits are fixed; it is improbable that any change will weaken or remove them, and thus the rights of man are as secure as his own keeping can make them.

APPENDIX.

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE THE UNDER-SIGNED DELEGATES OF THE STATES AFFIXED TO OUR NAMES, SEND GREETING.— Whereas the Delegates of the United States of America in Congress assembled did on the 15th day of November in the Year of our Lord 1777, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay, Rhode-island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, in the words following, viz:—

"ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN

THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS-BAY, RHODE-ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW-YORK, NEW-JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH-CAROLINA, SOUTH-CAROLINA, AND GEORGIA.

ARTICLE I. The Stile of this confederacy shall be "The United States of America."

ARTICLE II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the united states, in congress assembled.

ARTICLE III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds,

and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. For the more convenient management of the general interest of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in any meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united states, in congress assembled, each state shall have one vote.

Freedom of speech and debate in congress shall not be impeached or questioned in any Court, or place out of congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with

any King, prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and have constantly ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively by whom such

forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.

ARTICLE IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the 6th article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint

consent, commissioners or judges to constitute a court for hearing and determining the matter in question : but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen ; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination : and if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing ; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive ; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned : provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward :" provided also that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states — fixing the standard of weights and measures throughout the United

States — regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated — establishing or regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office — appointing all officers of the land forces, in the service of the united states, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states — making rules for the government and regulation of the said land and naval forces, and directing their operations.

The united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state ; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years ; to ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such case ; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the united states ; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled : But if the united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and

equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

The Congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation is submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectfully represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union; Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the 9th Day of July in the Year of our Lord, 1778, and in the 3d year of the Independence of America.

Josiah Bartlett,	John Wentworth, jun. August 8th, 1778.	On the part and behalf of the state of New Hampshire.
John Hancock, Samuel Adams, Elbridge Gerry,	Francis Dana, James Lovell, Samuel Holten,	On the part and behalf of the state of Massachusetts-Bay.
William Ellery, Henry Marchant,	John Collins,	On the part and behalf of the state of Rhode-Island and Providence Plantations.
Roger Sherman, Samuel Huntington, Oliver Wolcott,	Titus Hosmer, Andrew Adam,	On the part and behalf of the state of Connecticut.
Jas Duane, Fras Lewis,	William Duer, Gouv' Morris,	On the part and behalf of the state of New York.
Jn° Witherspoon,	Nath ^l Seudder,	On the part and behalf of the state of New-Jersey, Novem- ber 26th, 1778.
Rob ^r Morris, Daniel Roberdeau, Jon ^a Bayard Smith,	William Clingan, Joseph Reed, 22d July, 1778,	On the part and behalf of the state of Pennsylvania.

Tho. M'Kean, Feb. 12, 1779,	Nicholas Van Dyke,	} On the part and behalf of the state of Delaware.
John Dickinson, May 5, 1779,		
John Hanson, March 1st, 1781,	Daniel Carroll, March 1st, 1781,	} On the part and behalf of the state of Maryland.
Richard Henry Lee, John Banister, Thomas Adams,	Jn ^o Harvie, Francis Lightfoot Lee,	} On the part and behalf of the state of Virginia.
John Penn, July 21st, 1778,	Corns Harnett, Jn ^o Williams,	} On the part and behalf of the state of North-Carolina.
Henry Laurens, William Henry Drayton, Jn ^o Matthews,	Rich ^d Hutson, Thos. Heywood, jun.	} On the part and behalf of the state of South-Carolina.
Jn ^o Walton, 24th July, 1778,	Edw ^d Telfair, Edw ^d Langworthy,	} On the part and behalf of the state of Georgia.

CONSTITUTION OF THE UNITED STATES.

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

SECTION 1.

1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SECTION 2.

1. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and

within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION 3.

1. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The vice-president of the United States shall be president of the Senate, but shall have no vote unless they be equally divided.

5. The senate shall choose their other officers, and also a president *pro tempore* in the absence of the vice-president, or when he shall exercise the office of president of the United States.

6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4.

1. The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations except as to the place of choosing senators.

2. The congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.

1. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller majority may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

2. Each house may determine the rule of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he

was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time ; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION 7.

1. All bills for raising revenue shall originate in the house of representatives ; but the senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the house of representatives and the senate shall, before it becomes a law, be presented to the president of the United States ; if he approve, he shall sign it ; but if not, he shall return it, with his objections, to that house in which it shall have originated ; who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered ; and, if approved by two-thirds of that house, it shall become a law. But in all cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law.

3. Every order, resolution or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States ; and, before the same shall take effect, shall be approved by him ; or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.

The congress shall have power :

1. To lay and collect taxes, duties, imposts, and excises ; to pay the debts and provide for the common defence and general welfare of the United States ; but all duties, imposts, and excises shall be uniform throughout the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.
6. To provide for the punishment of counterfeiting the securities and current coin of the United States.
7. To establish post-offices and post-roads.
8. To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.
9. To constitute tribunals inferior to the supreme court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.
10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.
12. To provide and maintain a navy.
13. To make rules for the government and regulation of the land and naval forces.
14. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.
15. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress.
16. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and
17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION 9.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight;

but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or *ex post facto* law shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on any articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.

6. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

SECTION 10.

1. No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of the congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1.

1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years; and, together with the vice-president chosen for the same term, be elected as follows:

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. [The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then, from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the vote shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.]¹

4. The congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

5. No person, except a natural born citizen, or a citizen of the

¹ This paragraph has been superseded and annulled by the Twelfth Amendment.

United States at the time of the adoption of this constitution, shall be eligible to the office of president ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president ; and the congress may, by law, provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president ; and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected ; and he shall not receive within that period any other emolument from the United States, nor any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation : —

“ I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States ; and will, to the best of my ability, preserve, protect and defend the constitution of the United States.”

SECTION 2.

1. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices ; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur ; and he shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may

happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

SECTION 3.

1. He shall, from time to time, give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SECTION 4.

1. The president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1.

1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION 2.

1. The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before men-

tioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SECTION 3.

1. Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The congress shall have power to declare the punishment of treason; but no attainer of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

3. No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3.

1. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or

more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

2. The congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4.

1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

1. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution; or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

1. All debts contracted and engagements entered into before the adoption of this constitution shall be as valid against the United States under this constitution, as under the confederation.

2. This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEORGE WASHINGTON,

President, and Deputy from Virginia.

WILLIAM JACKSON, *Secretary.*

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

[The following amendments were proposed at the first session of the first congress of the United States, which was begun and held at the city of New York on the 4th of March, 1789, and were adopted by the requisite number of states. Laws of the U. S. vol. 1, page 82.

The following preamble and resolution preceded the original proposition of the amendments. They will be found in the journals of the first session of the first congress.]

[CONGRESS OF THE UNITED STATES.

Begun and held at the city of New York, on Wednesday the 4th day of March, 1789.

The conventions of a number of the states having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution :

Resolved, By the Senate and House of Representatives of the United States of America, in congress assembled, two-thirds of both houses concurring, that the following articles be proposed to the legislatures of the several states, as amendments to the constitution of the United States ; all or any of which articles, when ratified by three-fourths of the said legislatures, to be valid to all intents and purposes, as part of the said constitution, namely :]

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ; or abridging the freedom of

speech or of the press ; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ; and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ; and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

[The following amendment was proposed at the second session of the third congress. It is printed in the Laws of the United States, vol. 1, p. 73, as Article XI.]

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

[The three following sections were proposed as amendments at the first session of the eighth congress. They are printed in the Laws of the United States as Article XII.]

ARTICLE XII.

1. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom at least shall not be an inhabitant of the same state with themselves. They shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not ex-

ceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president. A quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

ARTICLE XIII.¹

SECTION 1.

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.²

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty

¹ Proposed by Congress February 1, 1865. Ratification announced by Secretary of State December 18, 1865.

² Proposed by Congress June 16, 1866. Ratification announced by Secretary of State July 28, 1868.

or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3.

No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4.

The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5.

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.¹

SECTION 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SECTION 2.

The congress shall have power to enforce this article by appropriate legislation.

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

CHIEF JUSTICES.

	APPOINTED FROM.	DATE OF APPOINTMENT.	END OF SERVICE.
John Jay	N. Y.	1789	1795 ¹
John Rutledge	S. C.	1795	1795 ²
Oliver Ellsworth	Conn.	1796	1800 ¹
John Marshall	Va.	1801	1835 ³
Roger B. Taney	Md.	1836	1864 ³
Salmon P. Chase	Ohio.	1864	1873 ³
Morrison R. Waite	Ohio.	1874	1888 ³
Melville W. Fuller	Ill.	1888	⁴

¹ Resigned.

² Served one term. Not confirmed.

³ Died.

⁴ Now on the bench.

¹ Proposed by Congress February 27, 1869. Ratification announced by Secretary of State March 30, 1870.

APPENDIX.

ASSOCIATE JUSTICES.

		APPOINTED FROM.	DATE OF APPOINTMENT.	END OF SERVICE.
John Rutledge	.	S. C.	1789	1791 ¹
William Cushing	.	Mass.	1789	1810 ³
James Wilson	.	Pa.	1789	1798 ³
Thomas Johnson	.	Md.	1791	1793 ¹
John Blair	.	Va.	1789	1796 ¹
James Iredell	.	N. C.	1790	1799 ³
William Paterson	.	N. J.	1793	1806 ³
Samuel Chase	.	Md.	1796	1811 ³
Bushrod Washington	.	Va.	1798	1829 ³
Alfred Moore	.	N. C.	1799	1804 ¹
William Johnson	.	S. C.	1804	1834 ³
Brockholst Livingston	.	N. Y.	1806	1823 ³
Thomas Todd	.	Ky.	1807	1826 ¹
Gabriel Duval	.	Md.	1811	1836 ¹
Joseph Story	.	Mass.	1811	1845 ³
Smith Thompson	.	N. Y.	1823	1844 ³
Robert Trimble	.	Ky.	1826	1829 ³
John McLean	.	Ohio.	1829	1861 ³
Henry Baldwin	.	Pa.	1830	1846 ³
James M. Wayne	.	Ga.	1835	1867 ³
Philip P. Barbour	.	Va.	1836	1841 ³
John Catron	.	Tenn.	1837	1865 ³
John McKinley	.	Ala.	1837	1852 ³
Peter V. Daniel	.	Va.	1841	1860 ³
Samuel Nelson	.	N. Y.	1845	1872 ¹
Levi Woodbury	.	N. H.	1845	1851 ³
Robert C. Grier	.	Pa.	1846	1870 ¹
Benjamin R. Curtis	.	Mass.	1851	1857 ¹
John A. Campbell	.	La.	1853	1861 ¹
Nathan Clifford	.	Me.	1858	1881 ³
Noah H. Swayne	.	Ohio.	1862	1881 ¹
Samuel F. Miller	.	Iowa.	1862	1890 ³
David Davis	.	Ill.	1862	1877 ¹
Stephen J. Field	.	Cal.	1863	1897 ¹
William Strong	.	Pa.	1870	1880 ¹
Joseph P. Bradley	.	N. J.	1870	1892 ³
Ward Hunt	.	N. Y.	1872	1882 ¹
John M. Harlan	.	Ky.	1877	4
William B. Woods	.	Ga.	1880	1887 ³
Horace Gray	.	Mass.	1881	1902 ³
Stanley Matthews	.	Ohio.	1881	1889 ³
Samuel Blatchford	.	N. Y.	1882	1893 ³
Lucius Q. C. Lamar	.	Miss.	1888	1893 ³
David J. Brewer	.	Kans.	1889	4
Henry B. Brown	.	Mich.	1890	4
George Shiras, Jr.	.	Penn.	1892	1903 ¹
Howell E. Jackson	.	Tenn.	1893	1895 ³
Edward D. White	.	La.	1894	4
Rufus W. Peckham	.	N. Y.	1895	4
Joseph McKenna	.	Cal.	1898	4
Oliver Wendell Holmes	.	Mass.	1902	4
William R. Day	.	Ohio.	1903	4

¹ Resigned.³ Died.⁴ Now on the bench.

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